In the Supreme Court

OF THE

UNITED STATES.

NO. 217.

The Cosmos Exploration Company,

Appellant,

vs.

The Gray Eagle Oil Company, Green Whittier Oil Company, Mount Diablo Oil, Mining & Development Company, Spellacy Oil Company, Mallory Oil Company, Timothy Spellacy, Mericose H. Whittier, Burton E. Green, C. A. Canfield, J. A. Chancellor, W. H. Mallory, Sadie J. Mallory, Sarah P. Starkey, C. H. Starkey, J. E. Gray, Charles C. Slane, H. J. Kennedy, W. T. Sesnon, W. E. Knowles, A. J. Samuels, J. H. Wood, C. W. Clark, John Doe *et al.*,

Respondents.

BRIEF ON BEHALF OF THE RESPONDENTS.

Owing to the distance of the respondents and their attorneys from the court, the respondents cannot await the filing of the brief on behalf of the appellant, should it avail itself of the rule of the court, and therefore in

presenting this brief, find it necessary to present as briefly as possible a statement of the facts upon which the questions herein involved depend.

This suit was brought in the United States Circuit Court on the 4th day of August, 1900.

Trans. p. 18, fol. 34.

Its object was to obtain a judgment of the court that there was vested in the complainant a full and complete equitable title to an undivided three-fourths interest in the property involved in the controversy, and an undivided one-fourth interest therein in C. W. Clark, who was made a party defendant in the suit, and that the complainant should have judgment for the possession thereof, and also asking that a receiver be appointed by the court to take possession of the lands described in the bill, and preserve the same and the product thereof, then on the premises until the further order of the court, but not to operate the wells thereof except to the extent necessary, if at all, to preserve the same from deterioration in value, nor to market or to remove any oil therefrom, and also seeking an injunction *pendente lite.*

Trans. pp. 16-17, fols. 32-33.

On the 11th day of August, 1900, a subpoena was issued to the defendants, requiring them to appear on the 1st day of October, 1900, to answer the bill [Trans. p. 18, fol. 35]. The subpoena was served on the various defendants at different times [trans. pp. 19-20], and the Gray Eagle Oil Company, C. A. Canfield, J. A. Chancelor, Timothy Spellacy and J. H. Wood, filed their demurrer to the bill on the 27th of August, 1900

[Trans. pp. 21-22], and on the same day the Mount Diablo Oil Mining and Development Company, W. T. Sesnon, W. E. Knowles and A. J. Samuels filed a separate demurrer to the bill [Trans. pp. 23-24], and on the same day Burton E. Green and M. H. Whittier filed their joint and several demurrer to the bill [Trans. pp. 24-26, fols. 46-50], and on the 24th day of September, the court made its order sustaining the demurrers, denying the injunction, and the application for a receiver, and ordering the bill to be dismissed, and on the 26th of September, 1900, a decree was entered accordingly.

Trans. pp. 26-28, fols. 50-54.

On the 4th day of August, 1900, the Pacific Land & Improvement Company commenced a suit in the United States Circuit Court against the Elwood Oil Company, Bakersfield and Fresno Oil Company, Kern River Oil Company, Black Jack Oil Company, and John Doe and others, which had for its object the recovery of a judgment that the full and complete equitable title to the property involved in that suit was vested in the complainant, and praying for substantially the same relief in that case that was sought in the other.

Both of these controversies grew out of an attempt on the part of the complainants in the two suits, to obtain the title to certain tracts of land described in the bills, situated in the county of Kern, under the Forest Reserve Act, and the provision thereof which will hereafter be more fully set forth, in lieu of certain lands claimed to have been relinquished to the

United States under that act by the complainants or their predecessors.

In the Pacific Land & Improvement Company case the defendants, the Elwood Oil Company, Bakersfield & Fresno Oil Company, Kern River Oil Company and Black Jack Oil Company (the other defendants being fictitious), filed their demurrer on the 27th day of August, 1900.

Trans. pp. 15-17, fols. 29-32.

While there are some differences in the facts in the two cases, and some questions involved in one which are not involved in the other, yet as to the principal questions, the two cases are substantially the same. The defendants in both cases filed verified answers, as well as the demurrers, and which answers were used as affidavits, and also a large number of affidavits, and counter affidavits were filed in both cases. When they came up for argument, they were both heard together, and in the United States Circuit Court for the Ninth Circuit, they were both considered and determined together. [See the opinion of Judge Ross in the transcript in the Cosmos Exploration Company case, pp. 28-29].

And the same order that was made in the Cosmos case was made in the Pacific Land & Improvement Company's case, viz., the application for the receiver, and the injunction denied, the demurrer sustained, and the bill dismissed. [See Trans. Pac. Land & Impr. Co. v. Elwood Oil Co. *et al.*, p. 17, fol. 33].

And the decree followed as in the Cosmos case [Trans. p. 18, fols. 34-35].

Both cases were appealed to the Circuit Court of Appeals for the Ninth Circuit, and the appellant certified to that court no part of this record except the bills, demurrers and decrees. On the application of the respondents, an order was made by Judge Ross, of the Ninth Circuit, directing the clerk to certify the remainder of the record to the Circuit Court of Appeals. The appellants never did print the entire record in the Cosmos Exploration Company's case, but after printing the record consisting of the complaint, demurrer and decree, as before stated, they did print what was entitled the transcript of the remainder of the record in the case of the Pacific Land & Improvement Company v. Elwood Oil Company *et al.* The two cases were heard together in the Circuit Court of Appeals, and one opinion delivered therein in the said Circuit Court of Appeals, by which both cases were disposed of, and the judgment of the Circuit Court in both cases affirmed. For the opinion of the Circuit Court of Appeals, see Trans. pp. 67-83. The opinion of Judge Hawley, speaking for the majority of the court, begins on page 70, and he says: "The legal questions involved in these cases on file are identical, the facts are substantially the same. There are no differences between them so far as the demurrer to the bill are concerned, except in two particulars."

And he then proceeds to state those two particulars. The conclusion of his opinion and the order of the court affirming the judgment in both cases is on page 83 of the transcript.

The case is reported also in 112 Pac. Rep. pp. 4-22.

Following the course which has thus far been pursued, we shall make the brief in the Cosmos Exploration Company v. the Gray Eagle Company *et al.* the principal brief in the case, and ask leave to refer to it as a part of the brief in the case of the Pacific Land & Improvement Company v. the Elwood Oil Company *et al.*

The facts as shown by the bill of complaint filed in the case of the Cosmos Exploration Company v. the Gray Eagle Oil Company *et al.*, which case we are now considering, are substantially as follows:

After the formal allegations as to the incorporation of the various companies involved, and the value of the matter in dispute, the complainant alleges that it is the owner of an undivided three-fourths interest in lots one and two of the southwest quarter of section 30, township 28 south, range 28 east, M. D. B. & M., containing 165.35 acres, and also an undivided three-fourths interest in lots 1 and 2 in the northwest quarter of said section 30, containing 165.17 acres, *and that the full and complete equitable title thereto is now vested in the complainant.* That the defendants claim, and each of them claims and asserts an estate or interest in said property, adverse to the complainant's title thereto, and that said claim and assertion, except as to the claim of C. W. Clarke (who is not represented on this appeal by counsel for the other defendants, or at all so far as we know) are wholly without right, unjust and unfounded. That the rights of the respective parties to the land, its title and possession,

depend upon and exist by virtue of the matters and things thereinafter more particularly set forth.

See 3rd par. of bill, trans. p. 4.

In the fourth paragraph it is alleged that Congress passed an act making an appropriation for sundry civil expenses of the government, etc., and that in that act, which was approved June 4, 1897, was the following provision:

> "That in cases in which a tract covered by an unperfected *bona fide* claim, or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires so to do, relinquish the tract to the government, and may select in lieu thereof *a tract of vacant land open to settlement*, not exceeding in area the tract covered by his claim or patent, and no charge shall be made in such case for making the entry or issuing the patent for the tract selected. Provided further, that in cases of unperfected claims, the requirements of the laws respecting settlement, residence, improvements and so forth are complied with on the new claims, credit being allowed for the time spent on the relinquished claims."

Trans. pp. 4-5.

It is alleged, then, that on the 16th of November, 1899, C. W. Clarke was the owner, by title in fee simple, free of any lien or incumbrance, of a tract of 165.35 acres of land, which land was then, and still is, a non-mineral tract, covered by *bona fide* patent issued by the United States, and said tract was then, and still is included within the limits of a public forest reservation of the United States. That on the 9th of December, 1899, lots 1 and 2 of the southwest quarter

of section 30, in township 28 south, range 28 east, M. D. B. & M., containing 165.35 acres of land, and no more, were, and for more than one year continuously theretofore had been, surveyed, unappropriated, vacant public land of the United States, open to settlement, returned and characterized upon the official records of the United States as agricultural land, and free and open to settlement and entry under the laws of the United States, and the said land did not then contain any known mines, known salines, or known minerals or known petroleum or known mineral oils; nor had any minerals or petroleum or other mineral oils or mineral substances of any kind ever been discovered within the limits thereof. That the land described was situated in the county of Kern, within the southern district of California, and within the district of land subject to sale and disposition by the United States Land Office at Visalia, California.

Trans. pp. 5-6.

That on the 16th of November, 1899, Clarke, then being the owner of the tract referred to in paragraph 5, which, it will be noted, is not described, desiring to avail himself of the act of Congress referred to in paragraph 4, relinquished all of the said tract, that is, that mentioned in paragraph 5, to the government of the United States, by deed of conveyance duly relinquishing and conveying the same to the United States of America, and recorded the said deed in the office of the county recorder in the county in which said land is situated, and on the 8th of December, 1899, the said C. W. Clarke duly delivered to the register and

receiver of the United States Land Office at Visalia, California, and filed in said land office his deed to the United States, indorsed as recorded as aforesaid, together with the selection of the land described in paragraph 6, in lieu of the lands referred to in paragraph 5, and at the same time filed with the register and receiver a non-mineral affidavit, showing the selected tract contained no known minerals, and at the same time delivered to, and filed with, the register and receiver a full, true and correct abstract of his title to the relinquished tract, certified by the county recorder in which the tract was situated, showing him, the said C. W. Clarke, to be the owner thereof by title in fee simple, absolute, free of any lien or incumbrance at the time of such relinquishment, and at the time the said deed to the United States was made, and showing that his said conveyance to the United States vested in the United States the full, complete and perfect title thereto.

Trans. pp. 5-6, paragraph 7 of the bill.

That on the 8th of December, 1899, the register and receiver at Visalia duly accepted, received and filed the deed, abstract of title, non-mineral affidavit and selection of C. W. Clarke, and duly entered such selection upon the official records of the said Land Office, and did then and there certify that the said lands so selected by said Clarke, viz., lots 1 and 2 of the southwest quarter of section 30, township 28 south, range 28 east, S. B. & M., containing 165.35 acres of land, was free from conflict, and that there was no adverse filing, entry or claim thereto. And the said C. W.

Clarke thereupon and thereby became vested with a complete, equitable title to the said land so selected, and was thereupon entitled to receive a patent from the United States in pursuance of his selection for the said lands under the provisions of the act of Congress which had been referred to.

Trans. p. 6, par. 8.

That on the 16th of November, 1899, Clarke was the owner by title in fee simple, absolute, free of any lien or incumbrance, of a tract of 165.17 acres of land, which was then, and still is, non-mineral, covered by a *bona fide* patent issued by the United States, and was then and still is, included within the limits of a public forest reservation of the United States.

Trans. p. 6, par. 9.

It will be noticed that there is no description of this land except by the number of acres and its non-mineral character. It is further averred that on the 8th of December, 1899, lots 1 and 2 of the northwest quarter of section 30, township 28th south, range 28 east, M. D. B. & M., containing 165.17 acres were, and for more than a year theretofore had been, a tract of surveyed, unappropriated and vacant public lands of the United States, open to settlement, returned and characterized upon the official records of the United States as agricultural land, free and open to settlement and entry under the laws of the United States, and the said land did not then contain any known mines, known salines or known minerals or known petroleum or known mineral oil, etc., as averred with respect to the other tract of land.

Trans. pp. 6-7 par. 10 of the complaint.

We should have noticed that the references to the San Bernardino base and meridian in paragraph 8 of the complaint is a mistake, and that the base and meridian should have been Mount Diablo.

The 11th paragraph of the complaint, page 7, makes the same allegations with respect to the relinquishment of the tract of land referred to in paragraph 9, that had been made with reference to the first tract of land relinquished, viz., that the deed of relinquishment was made Nov. 16, 1899, recorded, and on the 8th of December, 1899, delivered to the register and receiver at Visalia, with a selection of the land described in paragraph 10 in lieu thereof, and its receipt by the register and receiver, together with the abstract of title and the certificate of the recorder, showing the title in the United States.

Tr. p. 7, fols. 12-13.

In the 12th paragraph it is alleged that on the 8th of December, 1899, the R. & R. at Visalia accepted, received and filed the deed, abstract, non-mineral affidavit, and selection of C. W. Clarke, and entered upon the official records of the land office, and that the register certified that the land so selected was free from conflict, and there was no adverse filing, entry or claim thereto, and then it is alleged as in the previous case, that thereupon and thereby a full, equitable title to the land selected vested in Clarke.

Trans. pp. 7-8.

In paragraph 13, [Trans. pp. 8-9], we are informed that on the 13th of January, 1900, Clarke, believing that there might be a possible defect in the title to the

forest reserve lands relinquished by him to the United States, described in paragraphs V and IX, and used as a basis for the selection of the other land, he filed, in the United States Land Office at Visalia, two amended selections of land under the said act of June 4, 1897, in one of which he selected lots 1 and 2 of the northwest quarter of section 30, township 28 south, range 28 east, M. D. B. & M., containing 165.17 acres, and in the other he selected lots 1 and 2 of the southwest quarter of said section 30, containing 165.35 acres, in which said amended selections he substituted instead of the land formerly designated in his said selections of December 8, 1899, as a basis for such selections, other non-mineral lands lying within a public forest reservation of the United States, of equal area, to which said Clarke had a perfect title at the time of conveying the same to the United States government. which said conveyance was made by Clarke to the United States on the 4th day of November, 1899, and duly recorded in the office of the county recorder of the county in which said lands were located, and the amended selections were accompanied by an abstract of title prepared by the county recorder in the county in which such surrendered lands were located, showing that such perfect title was vested in Clarke to those lands. The same allegations in respect to the non-mineral affidavit were made, and he says that the deed of Clarke for the tracts relinquished to the United States were the basis of such selections which had already prior thereto been filed with the register and

receiver of the said United States land office at Visalia, and was then on file in such office.

Tr. pp. 8-9.

Complainant proceeds to allege that the amended selections were an unnecessary precaution on the part of Clarke, for the reason that the title to the forest reserve basis for the original selection was not defective, but the amended selections were made in the abundance of caution so that in the event that there should be any defect in the title to the basis for such original selections, the same would be cured by, and the same was cured by, such amended selections. That the local officers accepted the amended selections, entered the same on the books of the office as amendatory of the former selections made by Clarke, of the same lands, on December 8, 1899, and that such amended selections operated to cure any defect in the former selection, etc. That on the day when they were made, the 13th of January, 1900, lots 1 and 2 of the southwest quarter, and lots 1 and 2 of the northwest quarter of said section 30, were, and for more than one year continuously theretofore had been, surveyed and unappropriated lands of the United States except so far as they were affected by the prior selections so made by Clarke, and were open to settlement, returned, and characterized upon the official register of the United States, as agricultural land, and free and open to settlement and entry under the laws of the United States, and did not then contain any known mines, known salines or known minerals or known petroleum, etc.

In paragraph XIV of the bill [Trans. p. 9], it is

again alleged that Clarke became, by virtue of these matters and things alleged, and was entitled to the possession of the entire fractional west half of section 30 aforesaid, and to the quiet, peaceable, uninterrupted and exclusive enjoyment of the same.

Now, it will be noticed that up to this time all these proceedings in the Land Department had been taken by Clarke, who claimed to be the owner of the land relinquished, and the selector of the lands in lieu thereof, and he is the same Clarke who is a defendant in the suit.

It is then alleged that on the 9th of July, 1900, Clarke, by an instrument in writing, transferred an undivided three-fourths of the fractional west half of said section 30, and all his right, title and interest thereto, to the complainant, who has ever since been the owner thereof.

Tr. p. 9, par. 412.

In the XV paragraph, the complainant proceeds to repeat the opinions held by the complainant as to the effect of these proceedings, and that effect was that Clarke had exchanged the land in the forest reserve for the land selected as therein set out; and that by virtue of the operation of the law under which the exchange took place, the full, complete and equitable title to the lands selected by Clarke had become vested in him, and that by virtue of the deed from Clarke the complainant was now the owner of a three-fourths interest, and entitled to a patent vesting the legal title in him. And that the defendants other than Clarke controvert and deny this claim made by the complainant

to a perfect equitable title to the land, and denied complainant's right to the exclusive or any possesion thereof, and claim that the proceedings taken, set forth in the complaint, did not vest in Clarke a perfect equitable title, or any title, and that neither the complainant nor Clarke was entitled to the exclusive or any possession of the said lands, but that under the true and proper construction of the act of Congress referred to, the title to the land selected by Clarke remained subject to entry and exploration, location and purchase, as mineral lands by themselves or any other citizen of the United States until a patent is issued to the said Clarke, if ever, or to the complainant, which contention of the defendants the complainant controverts.

Trans. pp. 9-10.

The complainant then alleges that the defendants' claim that they have a right under the mineral laws of the United States relating to placer mining claims, and to petroleum lands, to enter upon the said lands and explore thereon and therein for petroleum and mineral oils; and that since the lands were selected by Clarke and since the 1st of February, defendants other than Clarke have entered thereupon and bored for and obtained petroleum thereon, and were then engaged in taking the same therefrom.

Trans. p. 10.

The complainant then further alleges that these defendants other than Clarke base their rights in, and title to the premises described in paragraphs VI and X upon some one or more of four certain pretended placer mining locations, the first purporting to cover

the southwest quarter of section 30, known as "Luck No. 4" oil placer mining claim, alleged *to have been made on the* 2nd day of June, 1899, under the mining law of the United States, by certain persons named.

The second purporting to cover the northwest quarter of section 30, alleged to have been made on the 2nd day of June, 1899, under the mining laws of the United States, by certain persons named, and which location was called "Luck No. 3" oil placer mining claim.

The third purporting to cover another tract, being a portion of the fractional west half of lots 1 and 2 in the northwest quarter of section 30, township 28 south, range 28 east, M. D. B. & M., containing 5.17 acres, located on the 7th of November, 1899, by certain other persons named, and called "Surplus No. 1" placer mining claim.

Another location covering the west half of lots 1 and of the southwest quarter of section 30, township 28 south, range 28 east, M. D. B. & M., containing 5.35 acres, located on the 7th day of November, 1899, by the same persons who had made the previous location of "Surplus No. 1," and which claim was called the "Surplus No. 2" placer mining claim.

That each and all of the defendants herein except Clarke claimed and asserted title to, and the right to possession of the lands described in paragraphs VI and X under these locations, and conveyances made by some or all of the locators of the said four placer mining claims.

Trans. pp. 10-11.

Note here, that the latest of these locations antedated this pretended exchange by more than a month, and the two earlier ones more than six months before these selections.

It is then next alleged that the pretended placer mining locations, and each of them was illegal and void. The reasons given are that they were not, nor was any or either of them, based upon any discovery of mineral within the boundaries thereof, or of petroleum oil within those boundaries until after the lands were located by Clarke under this act of Congress. That "Luck No. 3" was invalid and void for the further reason that the same embraces more than 160 acres of land; that "Luck No. 4" is invalid and void for the reason that the same embraces more than 160 acres of land; and both were void for the further reason that they were located by the same eight persons upon the same date, and such tracts were contiguous. That the same persons on the 2nd day of June, 1899, located the whole of section 30, and then we are told with all becoming gravity, that the practice of the same persons locating contiguous territory as placer mining ground so as to give each person more than 20 acres, is in violation of the spirit, intent and purpose of the United States mining laws, though it appears from the bill of complaint that in the opinion of the complainant, the location of the whole country by one person, if only pretended to be located under some other law, was not in violation of the statutes of the United States or of public policy.

That "Surplus No. 2" was invalid for the reason

that it purported to be a location of the west half of lots 1 and 2, in the southwest quarter of said section 30, whereas the southwest quarter of said section was divided into lots 1 and 2, and the most easterly 80 acres thereof being lot 1, and the most westerly 85.17 acres thereof being lot 2. And the claim of "Surplus No. 1" was equally invalid and void for a similar reason.

Trans., pp. 11-12.

In paragraph 17 it is alleged that after the lands described in paragraph VI were selected by Clarke, to-wit, on the 10th of February, 1900, the Gray Eagle Oil Company filed a protest against said selections wherein it alleged that the land so selected by Clarke were not subject to selection by him under the act of June 4, 1897, on the ground that the same was mineral land, and was included within the boundaries of a valid placer mining location, and prayed that the Commissioner of the Land Office order a hearing to determine the mineral character of them, and that the selection by Clarke be rejected and disapproved, and said protest *is now pending before the commissioner of the General Land Office.*

That after the lands described in paragraph X were selected by Clarke, and on the 10th of February, 1900, the Gray Eagle Oil Company filed, in the United States Land Office at Visalia, California, a written verified protest against the selection of Clarke, claiming that the lands selected were not subject to such selection under the act of June 4, 1897, on the same ground, and prayed that the Commissioner of the General Land

Office order a hearing to determine the mineral character of said land, and that upon said hearing the selection be disapproved, and the protest was forwarded to the Commissioner of the General Land Office.

Trans. p. 12.

Then follow allegations that on the 12th of February, 1900, Mallory and others filed a protest against the selection of Clarke on the same grounds, and praying for a hearing, and their protest was against both selections as in the other case. A.. .. that these protests were pending before the Commissioner of the Land Office.

In the 18th paragraph it is alleged that neither of these protests show that there was any known mine or known salines or known existing petroleum wells or known petroleum deposits on any of the land described in paragraphs VI and X at the time they were selected by Clarke, which shows such lands or any part thereof was more valuable for mining or petroleum than for agricultural purposes or otherwise, and that because the protests failed to show such facts they were, and each of them was, insufficient to warrant or justify a hearing being ordered by the Land Department of the United States to re-establish or re-determine the character of said land or to change the present classification thereof as fixed by the former report of the surveyor general, and of the confirmation thereof by the land department as hereinbefore mentioned, and insufficient to impair or affect the validity of Clarke's selection, and that under the laws giving jurisdiction to the land department of the United States to dispose

of the public lands, and under the rules and regulations of said department promulgated to govern contests or protests against selections of land under the act of Congress of June 4, 1897, only 60 days after published notice of such selection under such act is given and allowed to any person or persons to file protests in the local land office of the United States against selections under the law of June 4, 1897, or to file an adverse claim to the land selected. That notice of such selection of said land by said Clarke was given and published on the — day of January, 1900, and that the protests which had been before alleged were the only ones which had been made, and which the complainant says in broad, general terms, did not state facts which impair or affect the right of Clarke or the complainant in the selected land, or show any reason why a patent should not issue. And that the defendants were bound, and estopped by their said protests and their contents; and the facts therein stated, if admitted, do not show that defendants or any of them have any interest in said lands as against Clarke or the complainant, and that upon the facts as plead by said protest the land department of the United States cannot lawfully refuse or deny the issuance of a patent, etc., though it will be observed that great care is taken never to allege the contents of the said protests or any portion of those contents. It is only alleged what they are not sufficient to show, and the pleaders' notion of their insufficiency to affect the validity of Clarke's claim.

Trans. pp. 13-14.

And in paragraph XIX it is said, in substance, that notwithstanding the complainant's right to the complete, quiet, peaceable, uninterrupted, exclusive enjoyment and possession, and of its complete equitable ownership, the defendants except Clarke, knowing of the selection of Clarke, and without any right in themselves, did, on or about the 1st of February, 1900, and at numerous times since such date by themselves and their employes without right, title or claim so to do, without the knowledge or consent of Clarke, and in disregard of his rights erect derricks and other machinery thereon, and proceed to excavate the soil and bore wells, and drive iron pipes therein, seeking for petroleum, etc., for the purpose of taking the same, if found, for their own use and removing the same, and they did find the oil, as is alleged, on or about the last of February, 1900, in profitable quantities, and were then engaged in mining the same, and taking the petroleum oil from the said wells, and unless restrained by the court, they would continue to do so, and sell and market the same and appropriate the proceeds to the complainant's great loss and damage. That they gave out and claimed that the complainant had no rights in the premises, and by their conduct they prevented the complainant's enjoyment or sale of the property, and threatened, that they and their employes, would do personal violence to anyone representing the complainant who came upon the premises in any manner to peacefully protect said property from waste, spoilation or diminution of value by defendants, and alleged the be-

fief of the complainant that the threats would be executed unless they are restrained by the court.

Trans. pp. 14-15.

It is, in paragraph XX, further alleged that the community had become excited and angry, and violent feeling existed in the minds of the people against all persons seeking or attempting to acquire title to lands in that locality under the provisions of the act of Congress of June 4, 1897, and that no one in the community who has any sympathy or affiliation with those attempting to acquire such title, dare show his sympathy or affiliation for fear of personal violence and social ostracism. And more of the hostility in regard to this matter, and all for the purpose of obtaining a receiver and an injunction.

Trans. pp. 15-16, fols. 30-31.

That Clarke was the owner of, and entitled to one-fourth of the land, and had been asked to join as plaintiff in the suit, but he declined. For that reason he is made a party defendant.

Then follows the prayer, the substance of which we have already stated.

The Gray Eagle Oil Company, Canfield, Chanslor, Spellacy, and Wood, five of the defendants, filed their joint and several demurrer to this bill upon the grounds:

1. That the court had no jurisdiction.

2. That the facts stated in the bill did not entitle the plaintiff to any relief therein sought and prayed for against the defendants.

3. That the bill was multifarious. And

4. That the bill was insufficient to entitle the plaintiff to any relief.

Trans. pp. 21-22, fols. 39-41.

The Mt. Diablo Oil and Development Company, W. T. Sesnon, W. E. Knowles and A. J. Samuels also demurred, alleging as grounds that the court had no jurisdiction, and that the bill did not entitle the complainant to any relief.

Trans. p. 23, fols. 43-44.

Burton E. Green and M. H. Whittier filed their joint and several demurrer to the bill on the ground that the court had no jurisdiction, that the bill did not state a cause entitling the complainant to any relief sought in the bill as against them, that the bill was multifarious, that the facts stated were insufficient to entitle the complainant to any relief, and that the complainant had not the legal capacity to bring the suit.

Trans. pp. 24-26, fols. 46-49.

In the opinion of Judge Ross, it is shown that in addition to these demurrers the defendants also filed verified answers, and upon the order to show cause a large number of affidavits were filed by and on behalf of the respective parties; that the demurrers and orders to show cause came on for hearing, and were heard together, the verified answers being also used as affidavits.

Trans. p. 29, fol. 55.

The question arising in this cause upon the record herein are:

1. Should the judgment of the Circuit Court of Appeals be affirmed or this appeal dismissed for the

failure on the part of the appellant to cause to be printed a proper record in this case?

2. Can this bill be maintained by a party out of possession against the parties in possession?

3. Can such a bill be maintained where it is shown upon the face of it that the controversy is as to the rights of the parties in public lands of the United States, and that those rights are involved in a controversy pending before the land department of the United States?

4. Had the complainant upon the facts set forth in the bill, any title to the lands involved, legal or equitable?

5. Is the complainant entitled to any relief upon the facts set forth in the bill?

6. Is the bill multifarious?

BRIEF OF THE ARGUMENT.

I.

The Judgment of the Circuit Court of Appeals should be affirmed, or the appeal dismissed, for failure to file transcript.

We have already called attention to the fact that when cited to appear in the court to show cause why an injunction should not be granted and a receiver appointed, we appeared, and for such cause not only demurred to the sufficiency of the bill, but we answered it by a verified answer, and a large number of affidavits were filed by the respective parties in support of their several claims. That the whole matter was heard at

once. [Trans. p. 29.] And it will be seen in the opinion which was delivered by Judge Ross in the Ninth Circuit, that these affidavits were considered by him, and had a most decided and important influence upon the decision which he rendered. After reciting the proceedings appearing to have been taken by Clarke, the predecessor of the Cosmos Exploration Company in the land office, for the purpose of selecting the lands in controversy, and obtaining a patent thereto [Trans. pp. 29-31], and considering what appeared with reference to the claims of the defendants to those lands having their foundation in these mineral locations referred to in the bill [Trans. pp. 31-35] and setting forth the notice which was published by order and under the directions of the receiver of the land office at Visalia, notifying all whom it might concern, that C. W. Clarke had filed

"An application *to select* under the act of June 4, 1897, the following tract, which is embraced in a township containing mineral claims of record, viz.: Lots 1 and 2 of N. W. ¼ of Sec. 30, T. 28 S., R. 28 E., M. D. M."

Trans. p. 35, fol. 69.

and which notice further stated that a copy of the lists had been conspicuously posted in their office for inspection, then directed that within the next sixty days following the date of this notice under the departmental regulations of November 15, 1899, protests or contests against the claim of the said applicant to any of the tracts or subdivisions therein described on the ground that the same is more valuable for mineral than for agricultural purposes *will be received and noted for report*

to the General Land Office at Washington, D. C. Failure to protest or contest the claim of said applicant to said lands within the time specified will be considered as sufficient evidence of their non-mineral character, *and selections being otherwise free from objection will be recommended for approval.*

Trans. pp. 35-36.

The opinion then recites that pursuant to this notice, certain of these defendants (naming them) made a protest, and the protest of the Gray Eagle Oil Company, bearing date February 9, 1900, and filed in the local office on that day or the next, setting forth the grounds upon which that protest was made, and which protest set forth the work and development that had been done by the Gray Eagle Oil Company and its predecessors in interest, that they had drilled oil wells upon the claims, and that petroleum had been found therein in paying quantities, and that the Gray Eagle Oil Company and its predecessors in interest had continuously worked and developed the said mining claim since the date of its location, June 2, 1899. Protests and affidavits also show that said land covered by the said mining claim was high, dry, sandy and desert land, absolutely unsuitable for agricultural or grazing purposes, and of no value for any other purpose than for the petroleum that it contained, all of which, the protest and affidavits showed, that Clarke well knew at the time he made his application for the said land; that the said protest was filed in the office of the register and receiver of the land office at Visalia long prior to the expiration of the sixty days mentioned in the notice,

and that the register and receiver duly noted the filing thereof, and carefully considered the same, and forwarded the protest to the General Land Office at Washington, D. C., with recommendations that a hearing be ordered as prayed for therein.

The court then shows that similar answers were filed to the bill by the other defendants, Burton E. Green, M. H. Whittier, the Mt. Diablo Oil Mining & Development Company, W. T. Sesnon, W. E. Knowles and A. J. Samuels, except that in the answer of Green and Whittier the mining location under which they claim, embraced part of the southwest ¼ of section 30, and known as "Luck No. 4" oil placer mining claim, and except that in their answer it was alleged that their predecessor in interest, the Gray Eagle Oil Company, which was the successor in interest of the original locators of the claim, commenced the work to drill an oil well thereon with a standard drilling rig on the 28th of November, 1899, and has prosecuted the work of boring and drilling for oil continuously and with all possible diligence ever since, and that the well has produced oil in large quantities for many months last past.

And the opinion of the court proceeds to show that in these protests affidavits accompany the same. Affidavits were filed in this cause on the order to show cause, including the answer which was treated as such affidavit, and did, at least on their face, show that there had been a valid location of these mining claims long prior to the application by Clarke, the predecessor of the plaintiff, for a patent, and that those locations were

made at the time alleged in the bill filed herein, and that the work of developing the said mines had been prosecuted with all diligence commencing prior to any application made by Clarke, and continued until the result had been the development of petroleum in large quantities, and that the defendants in this action, and their predecessors, locators of these mining claims, had diligently prosecuted not only the work of development, but had also been engaged long prior to the commencement of this suit, in extracting the petroleum from these mining claims by the process of pumping, and had expended large sums of money, both in the exploration and development, and in the operation of the mines discovered thereon, and that the facts of the locations and the development of the mineral products of the land were perfectly notorious.

Trans. pp. 35-39.

But the more important question related to the knowledge of Clarke and his coadjutors of the mineral wealth of this land, and the section of country in which it is located, at the time they made this application. For it is apparent on the face of the bill that at the time the suit was brought there was not any question about the character of the land, for it will be seen that one of the very objects of the suit was to prevent the extraction and sale of this mineral product which was the business that these defendants were then engaged in. Complainant claimed, at least at the time of the commencement of these suits and for a long time afterwards, that these lands were not known to be mineral at the time they made the application for a patent. And

furthermore, they were then, and doubtless are now, disposed to insist that that knowledge can only come from an actual discovery of mineral, sufficient to constitute a completed and perfected mining location under the laws of the United States. And indeed, as they have grown in knowledge derived from further studies, and many different arguments of the questions involved in this controversy, they seem, or did seem, disposed at the last hearing, to insist that even that was not sufficient, but that in some way or other the fact of its mineral character must have gotten upon the records of the land office at Visalia.

But upon the hearing in this cause, these affidavits on the part of the defendants, as is shown by the opinion of Judge Ross, did show that these lands were no more fit for anything else except its petroleum products than the shores of the Dead Sea, and that they were mineral lands and that Clarke and those acting with him knew it, or at least believed it with all their might at the time they made these applications. And the most important and significant of them all upon this question were the affidavits of Wylie on the part of the defendants, and of Mr. Shirley C. Ward on the part of the complainant. For the character of these lands as considered by the learned judge of the circuit court in his opinion, we call particular attention to pages 40-41 of the transcript. As to the knowledge of Clarke at the time that he made this application, we call attention to the transcript, page 41, fol. 81, to page 48, fol. 98. The matters to which we here call particular attention are the following:

Wylie, who was at the time in question the superintendent of the Petroleum Development Company, some of whose lands or lands to which that company claimed title under the mining laws, had been selected under the forest reserve lieu land act by clients of Mr. Ward, stated in his affidavit, among other things, that on or about the 14th day of January, 1900, he received a telegram from Mr. Ward, dated San Francisco, and which was in substance as follows: "Can you meet me at Southern hotel tomorrow 5 o'clock? Confidential." To which he stated that he replied: "You can find me at the wells at any time."

Subsequently he received from Mr. Ward a letter, of which the following is a copy:

"On Board South-bound Owl, June 17, 1900.
"Mr. H. G. Wylie, Bakersfield, Cal.

"My Dear Sir: I have an exceedingly important matter which I wish to present to you bearing upon the oil-land situation in the Kern River belt & I hoped to have gotten to Bakersfield the other day when I telegraphed you from San Francisco to have talked the matter over with you there, but urgent matters prevented my doing so, & I would stop now to see you but urgent business requires that I be in Los Angeles tomorrow morning. What I have to say I believe means a handsome thing for you if you care to co-operate with me. Quick action is necessary to take advantage of the situation & if you can spare a day away from the wells, I wish you would come to Los Angeles on the train tomorrow night, the 18th inst., & see me the next morning, & if we do no business, I will gladly pay the expenses of your trip. Please let me hear from you by that train anyway.

"Yours truly,
"SHIRLEY C. WARD."

Trans. pp. 41-42, fols. 81-82.

The learned judge of the circuit court then proceeds to state the general substance of this affidavit, except as to certain matters which the court did not find it necessary to set out and which do not have much bearing upon this question.

See Trans. p. 42.

But the court then passes to the affidavit of Mr. Ward, which was filed in opposition to this affidavit of Wylie, and he admitted sending the telegram and the letter to Wylie; admitted the interview in his office; contradicts Wylie as to one matter which, as we said before, for the purposes of the present controversy, is quite immaterial, but in that affidavit he makes this statement which Judge Ross quotes, to-wit:

> "That at the time said interview occurred affiant knew that said Wylie was in the employ of the Petroleum Development Company and was superintendent of the field-work thereof, which company was operating in the production and marketing of oil in the Kern River oil district in Kern county, California, but affiant did not know at the time of such interview that the Petroleum Development Company either owned or leased, or claimed under mineral locations or otherwise, any of the lands which had been selected under the act of Congress of June 4, 1897 (30th Statutes at Large, 36), by any of the clients of affiant or by any parties represented in any way by affiant; that the sole purpose of such interview between affiant and said Wylie was to engage said Wylie to make frequent examinations of and keep in close touch with the lands which had theretofore been selected under the act of Congress aforesaid by parties represented by affiant, in order that said Wylie might be advised instantly of any trespass upon such property, or any portion thereof, by any parties entering upon the same for the purpose *of devel-*

oping petroleum thereon, or otherwise, and in order that said Wylie might secure evidence, as the same arose, of any entry that might be made upon such lands by any parties attempting to bore or drill thereon for petroleum, and in order that said Wylie might keep a constant record of the dates at which any of such entries were made, and of the parties by whom made, and that said Wylie might be advised in the event that any oil developments were had upon such lands and of the progress thereof, *and the exact time* at which, if ever, oil was discovered or found in any of such borings or wells, all to the end that said Wylie might keep affiant and the parties whom he represented as attorney at once and constantly advised of the movements that were made from time to time upon such lands, to the end that affiant would have a complete and perfect record of everything that transpired upon the lands already selected subsequent to the date of such interview, so that he might thereby be in a position to refute and overcome any false showing of fact, which the mineral claimants might at any time attempt to make as to the time they entered upon any of such selected lands, or the time at which *they discovered oil thereon.* That affiant was led to resort to such a means of having a complete record and a check upon all the movements that might thereafter occur upon the lands which had been selected by his clients, because he was impressed with the danger of being overwhelmed with a multitude of false affidavits as to the time the first discoveries of oil upon said premises were made, in the event that any such discoveries should ever thereafter be made thereon, and affiant having heard that certain mineral claimants had stated that they could produce an oil discovery with a hydraulic rig in a single night by boring a shallow hole and pouring oil in from above, and fearing that some such fraudulent practice might be resorted to, he felt the necessity of having some one *who was in touch with everything going on in the district*

constantly on the watch to discover and expose any such fraudulent practice, if the same should be resorted to on any of the lands which his clients were interested in. That affiant *realized that the outcome of such selections* as had been made by his clients in such Kern River district depended upon being able to show truthfully and accurately to the court or to the Land Department *the facts as they actually existed at the date of such selections*, and that affiant realized the difficulty of presenting the truth to the court upon such questions, where the sentiment existing in the community in which such lands were located was as strongly adverse to scrip titles and as strongly in favor of placer location titles as was the case in such community. That realizing such difficulty, affiant sought to obtain the assistance of some one who was upon the ground, and in a position to know from day to day, exactly what transpired upon the lands in which his clients were interested, and realizing the importance of being able to show the facts as they actually existed at the date of such selection, and realizing the absolute necessity of being able to expose and show the falsity of any perjured testimony concerning such matter, affiant wired and wrote to said H. G. Wylie, as in the affidavit of said Wylie stated."

Trans. pp. 42-44.

The court goes on to quote much from the affidavit of Mr. Ward, all of which is important in this matter, and among other things, he said that in the conversation with Wylie he had stated to Wylie that as a result of his examination of the law and his consultation with other attorneys in San Francisco, he had early in December, 1899, come to the conclusion that there could be no valid mining location of lands supposed to be chiefly valuable for petroleum, unless the same was based *upon the actual discovery of oil upon the*

specific property, and that the actual discovery was the *very basis of such mining location; and* that as there were no surface discoveries of oil in the Kern River district, except possibly the old Elwood discovery on section 3, down at the river bank, that he had been trying to find a method by which good title could be acquired to such lands *in the absence of, and prior to the actual discovery of oil*; and that early in December, 1899, he had come to the conclusion that good title could be acquired to such lands under the forest reserve lieu land act, and that having come to such conclusion, and advised some of his clients to that effect, they had already selected and entered under such act a large body of land scattered throughout the Kern River district, amounting to between *two and three thousand acres;* that such lands had been carefully examined by a number of witnesses before they were selected, and it was found beyond all question that the same were unoccupied, and that they contained no discoveries of oil or improvements whatsoever at the time of their selection.

Trans. p. 44, fol. 86.

It is evident that, in this statement, the counsel was bringing to his aid his legal opinion, for in the bill itself it is alleged that these defendants claim under mining locations which had been made long prior thereto, and in the affidavits made by the defendants that they had been engaged continuously in working and developing those mines. But the point in this matter here, is that every line and letter of Mr. Ward's affidavit shows that his clients were not applying for

these lands as agricultural lands, and that they knew, or at least they believed strongly enough to invest their money in it, that they were mineral lands. That they were seeking spots where, in their judgment, no technical discovery had been made, and then seeking to arm themselves with testimony to show exactly the time when the discoveries might thereafter be made, which they, probably, firmly believed would be made. It will be noticed in the letter to Wylie, he does not refer to these lands as anything else than oil lands. Their agricultural value was shown to be nothing. He had not only taken his own opinion, but he had conferred with other counsel in San Francisco as to the mode by which the United States government could be circumvented, and those laws which had been passed for the disposition of the mineral lands could be defeated, and that their conclusion was that the proper way to do this was under this forest reserve lieu land act; and that not one of them was ever thinking of anything else than obtaining the title to these oil lands in the Kern River district, and that as a result of all of these cogitations and conclusions, they had acquired a large amount of this forest reserve lieu land for exchange, and they reached the conclusion that they could obtain these mineral lands by that process in the early part of December, and these cases disclose what they did on the strength of it, for we find that in the early part of December, and doubtless as soon as they came to this conclusion, these particular applications were made.

Now, when the opinion of Judge Ross is read, it

will be seen that the decision which he delivered in these cases was founded very largely upon those affidavits which, by their own admissions, was an attempt on their part to obtain the title to lands which, if in a technical sense, they did not know, yet they firmly believed, to be mineral lands, by means other than those which the laws of the United States had provided for the acquisition of such title. It is obvious, therefore, that this record, which is here printed, is not the record upon which Judge Ross' opinion was given, nor the opinion in the Circuit Court of Appeals.

And these matters are of importance in this controversy, and were justly considered as of great weight in the decision of the case in the Circuit Court of the ninth circuit. The Congress of the United States has made stringent provisions to prevent the disposition of the mineral lands in any other manner than that prescribed by the acts of Congress for the sale of those lands. The price to be paid for them is different, and it has been expressly declared by the Congress that in all cases lands valuable for minerals shall be reserved from sales except as otherwise provided by law.

R. S., Sec. 2318.

It was decided in Deffebach against Hawke, 115 U. S. 392, 29 L. 423, that no title from the government to land known *at the time of sale* to be valuable for minerals of gold, silver, cinnabar or copper can be obtained under pre-emption, homestead or town site laws, or otherwise than by laws specially authorizing the sale of such lands, except in Oregon, Wisconsin, Minnesota, Missouri and Kansas. Since the time of that decision,

petroleum lands have been brought within the acts of Congress providing for the sale of mineral lands, and put upon the same footing.

This doctrine was approved in Davis v. Wiebold, 139 U. S. 515, 517; 35 L. 241, 242.

And this was again affirmed in Barden v. Northern Pacific Railway Co., 154 U. S. 288; 38 L. 992, 1000.

Now, we repeat, that the affidavit of Mr. Ward in this case does show that they knew what character of lands they were seeking to obtain the title to, and that they had been deliberately conferring among themselves and with other persons as to the mode of acquiring the title to that kind of land without the necessity of conforming to the laws passed for their disposition. A patent issued to them under such circumstances would be vacated and set aside.

In United States v. Culver, 52 Fed. 81, the facts were that the government of the United States had brought a suit to cancel two certain patents issued to the defendants for certain lands described in the complaint, and which were in the bill alleged to be mineral, and known to the defendants to be such at the time they were purchased, and that the defendants made the government officers at the time of the purchase certain false and fraudulent statements relating thereto. The lands were purchased by the defendant Culver under the proclamation of President Hayes, dated October 8, 1877, offering them together with a large quantity of other lands, for sale, and were purchased by defendant Culver at the Camden land office, at private sale, about July 7, 1878. They were purchased as agri-

cultural lands. Patents were issued to Culver, one on the 9th of July, 1878, and the other on February 12, 1881, and on May 11, 1881, he conveyed the land to his co-defendant Rumsey. And it was alleged in the bill that Rumsey was not an innocent purchaser, but that Culver was simply acting either as a partner or agent of Rumsey, and both had full knowledge of the mineral character of the land in question. In the opinion of the judge before whom the cause was heard, he said that they were mineral lands, and that Culver, the party who actually bought them, knew their mineral character at the time he bought them, and that Julian Rumsey, the ancestor of the other defendant, knew of their mineral character at the time Culver conveyed them to him. That they both bought the lands because they desired to hold them as mineral lands. That they had both examined the lands in question and had them examined by a mineral expert, who reported to them his belief as to their mineral character. And the court held that their act in buying them by cash entry as agricultural lands with knowledge of their true character, would vitiate the sale, and they would not be entitled to hold them because of the fraud perpetrated upon the officers of the government.

There was still another ground on which they were held to be invalid, but the court concluded by saying:

> "Upon both legal grounds set out above, the patent must be held void, and a decree must be entered for the cancellation of the same, and it is so ordered."

52 Fed. 82-83.

The other ground was that they were sold in violation of this section of the Revised Statutes to which we have referred.

Now, the affidavit of Ward shows that they had made a close investigation of these lands before making these applications. And in view of the fact that it was not concealed in his affidavit, nor in his letter, that mineral lands were what he was after, it is respectfully submitted that they had as much knowledge, and the same kind of knowledge, as existed in Culver's case. That patents issued for mineral lands when the patentee knew that they were mineral, will be canceled and set aside, see further,

United States v. Central Pacific R. Co. *et al.*, 84 Fed. 218.

In the Culver case it did not appear that there had ever been any mining claim located on the land, nor any discovery of a mine thereon before patent.

Nor can there be any question here as to its being more valuable for mineral than agricultural purposes, for, for the latter it has no value at all.

Now, from the entire opinions delivered herein, both in the Circuit Court and the United States Circuit Court of Appeals, it will appear, as we have stated before, that stress was put upon this showing made on the application for the injunction and the receiver. Furthermore, in the assignment of errors on the appeal to the United States Circuit Court of Appeals, one of the errors assigned was that the court erred in dismissing the complainant's bill, and in ordering that the

defendants have and recover from said complainant their costs and disbursements herein.

Trans. p. 62, fol. 122, 9th assignment.

And in the assignments in this court it is stated, (4) that the court erred in holding and deciding that the lands described in the bill of complaint were not vacant land at the time of their selection by complainant's grantor; (5) that the court erred in holding and deciding that the said lands were not, at said time, open to settlement; (6) that the court erred in holding and deciding that defendants' grantors lawfully entered upon said lands and made locations thereon, and erred in holding and deciding that they had a lawful right to be there; (7) the court erred in holding and deciding that defendants and their grantors ever, at any time prior to the discovery of petroleum therein, claimed such lands or any of them, to be mineral; and in holding and deciding that they or any of them, at any time prior to the selection by complainant's grantor, were diligently, or at all, at work to prove said land, or any part thereof, to be such; (8) the court erred in deciding that said lands were not vacant and open to settlement at the time of the selection, because they were then occupied by defendants' grantors under a claim and color of right; and (9) erred in holding and deciding that whatever a miner's right may be, the fact that he is in the actual possession of land without having made any location at all, shows that the land is not vacant.

Trans. p. 89, fols. 172-173, assignments 4, 5, 6, 7, 8, and 9.

It is obvious that each one of these assignments calls in question the correctness of the decision upon the matters which appeared as well upon the answer of the defendants and the affidavits of both parties as upon the bill of complaint.

But, say counsel, we have no right to look to these affidavits for any purpose on an appeal which they claim is an appeal merely from the decree dismissing the bill. And in the dissenting opinion of Judge Gilbert, of the Circuit Court of Appeals, he says:

> "But the opinion of the majority of the court contains the statement that the appellees were, at the time of the selection of these lands, as lieu lands, in the occupancy of the land they had located. They claim it to be mineral, and they were diligently at work to prove it to be such. This statement is based upon the assumption that there must be read into the bill certain facts which were found in the affidavits filed on behalf of the appellees upon the application which was made for an injunction. I know of no rule of chancery practice which permits us to do this or to take as proven any allegations that the complainant has not admitted to be true; but if indeed we are authorized to consider the case as if these facts had been incorporated in the bill, I am still of the opinion that the demurrer should have been overruled."
>
> Trans. p. 84.

But now it was not the assumption that there must be read in the bill certain facts which were found on behalf of the appellees; but without reading it into the bill, we say that these affidavits of the appellees and those of the appellant as well, were a part of the showing made before the judge of the Ninth Circuit Court, and that these matters were all heard together.

It has been complained by the appellant that the learned circuit judge erred in dismissing this bill without allowing the complainant to amend. But if the honorable circuit judge was right, that these parties were, by their own showing as well as that of their adversaries, attempting to perpetrate at least constructive fraud on the government of the United States, there was no reason why the complainant should be permitted to amend.

As to there being no rule of practice in the courts of equity that would permit this, while perhaps we may not be able to produce a direct authority on all fours with the present case, yet there are cases which we think are applicable to this question by analogy at least. Thus, in the case of Tornanses v. Melsing, 109 Fed. 710, Judge Gilbert, delivering the opinion, held that on an appeal from an interlocutory order appointing a receiver and granting an injunction, the Circuit Ciurt of Appeals may dispose of the case on the merits, when it determines that there is no equity in the bill which would warrant the granting of ultimate relief to the complainant. In that case the order appointing a receiver was reversed, the cause remanded with instructions to dismiss the bill, although the appeal was only from an order appointing a receiver and granting a temporary injunction. It may be said that the bill was a part of the showing upon which the injunction and receiver were granted. True, but then an appeal from the order granting the injunction or appointing a receiver would not ordinarily call in question the right of the complainant to maintain the bill, any more than

an appeal from a decree dismissing a bill would call in question the propriety of an order denying an injunction or appointing a receiver. When, upon the whole record as appeared at the hearing, there was no merit in the bill, there was found no objection to reversing the order and dismissing the bill.

The same doctrine had been held by this court in Smith v. Iron Works, 165 U. S. 525; 41 L. 810, cited by Judge Gilbert in support of his opinion in the Tornanses case, and also *In re* Tampa Suburban R. Co., 168 U. S. 583; 42 L. 589; also cited by Judge Gilbert. This court held in that case that where an order granted an injunction and directed an account, the Circuit Court of Appeals had authority to consider and decide the case on its merits.

And so in United States v. Rio Grande Dam & Irrigation Co., decided March 3, 1902, found in the Advance Sheets of the Opinions, of date April 15, 1902, page 428, this court, at page 430, said:

> "But there are other considerations which may be properly made the basis for the reversal of the decree to the end that injustice may not be done, as upon this appeal, and when the whole case is before us we can render such decree as, under the circumstances, may be proper. * * * If it appears that injustice may be done by proceeding to a final decree upon the record as it is presented to us, we have power to forbear determination of the merits and remanding the cause for further preparation."
>
> And see the cases there cited.

It thus appears that it has never been considered at all necessary to observe the ordinary rules of practice whenever, upon the whole case, that which is just and

proper is manifest. And, while, as we said before, these cases may not be precisely like the one in question, yet the principle involved is the same, and Judge Ross, having before him this whole matter, submitted at one and the same time, could do that which was right and proper and equitable upon that showing, without the necessity of continuing a proceeding that could never have any other result than that which was declared.

It does appear by the order made in the Circuit Court that this bill of complaint was dismissed, and that it was dismissed in part upon those affidavits, and if they cannot be considered here, then the judgment of the Circuit Court of Appeals should be affirmed, because this court would be called upon to do a vain thing, even if it should conclude that the demurrer ought not to have been sustained, for, in the Circuit Court of the Ninth Circuit, the bill stands dismissed upon other grounds than the sufficiency of the demurrer.

In Lee v. Johnson, 115 U. S. 48, 29 L. 570, *id.* 571, which case went up on a writ of error to the Circuit Court of Emmet county, Michigan, in which court the suit was commenced and a decree had been rendered dismissing the suit, but on appeal the Supreme Court of the state directed the judgment to be reversed and a decree given in favor of the plaintiff for the relief prayed for in the bill of complaint, it was said by this court that the Supreme Court of Michigan held the decision of the Secretary of the Interior inconclusive, because it was not upon a point in issue between the

contestants, and saying that the question was that of abandonment, which only was inquired into by the register, or could be considered on appeal, and that the jurisdiction of the secretary, if he disposed of the case finally on other grounds, was not appellate, but original, and that such jurisdiction had not been conferred; that the register on the hearing, and the commissioner on appeal, had decided that the plaintiff had not abandoned the land, and upon that ground there was no reversal of the decision. To this his honor, Justice Field, delivering the opinion of this court, said:

> "Whilst there are no formal pleadings in such cases, it is undoubtedly true, as a general rule, that in contested matters before the Land Department, *as in those before the courts*, the decision should be confined to the questions raised by the allegations of the respective parties; but this rule has its exceptions. If in any case it appears from the evidence that the claim of the complaining or moving party is *against public policy or the law*, so that in no event could he recover a final judgment or decision, whatever be the nature or extent of the testimony upon the point at issue, the tribunal should not hesitate to dismiss the suit or the proceeding."

And he immediately referred, as an illustration of the rule, to Oscanyan v. Arms Co., 103 United States, where a large sum was claimed from the vendor of fire arms, as commissions on sales that through the influence of the plaintiff, had been made to the Turkish Government, of which he was then an officer. The defendant had pleaded the general issue, and it was contended that the illegality of the contract could not be noticed because it was not affirmatively pleaded. But the court said:

> "Assuming the contract to be a corrupt one, forbidden by morality and public policy, the objection to a recovery could not be obviated or waived by any system of pleading, or even by the express stipulation of the parties; that it was one which the court itself was bound to raise in the interest of the due administration of justice."

It is submitted, therefore, that if it appeared from these affidavits in this cause that this proceeding was taken with the intent to violate or overreach the laws of the United States in regard to the disposition of the mineral lands, it was proper that the bill should be dismissed, even though it had stated a case which upon the face of the bill, appeared to entitle the complainant to relief. Rule 10, Sec. 9.

II.

A bill in equity to quiet a title cannot be maintained in the Federal Courts sitting as courts of equity, by a party out of possession and against the parties in possession, nor by a party not having the legal title.

The bill shows upon its face that the complainant is not in possesion, and that the defendants are.

Under such circumstances, a bill in equity to quiet a title will not lie.

Northern Pacific R. R. Co. v. Amacker, 49 Fed. 529, 534-535, and authorities cited;

Wehrman v. T. B. Conklin, 155 U. S. 314; 39 L. 167;

Whitehead v. Shattuck, 138 U. S. 146; 34 L. 873;
Frost v. Spitley, 121 U. S. 556;
Savage v. Worsham, 104 Fed. 18, 20;
Southern Pacific R. R. Co. v. Goodrich, 57 Fed. 879, 880-883.

And in the opinion here delivered by Mr. Justice McKenna, then Circuit Judge, it was shown that the fact that the legislature of the state may have conferred upon the state courts of equity the jurisdiction to entertain such a bill, although the complainant is out of possession, does not extend the jurisdiction of the Circuit Court of the United States in such cases.

And this was also held by the Circuit Court of the Ninth Circuit, for the Southern District of California, in Davidson v. Calkins, 92 Fed. 231.

Furthermore, in this bill it is distinctly shown that the complainant does not even claim to have a legal title, but an equitable title merely, and without considering now the question of whether it has any title, legal or equitable, it is submitted that to such a suit as is here brought, it is necessary that the complainant should have a legal title, as well as be in possession.

See cases above cited, and
Harland v. Bankers & Merchants Telegraph Co., 32 Fed. 305, 308;
Kennedy v. Elliott, 85 Fed. 832, 834-835.

We quote the following from the opinion of Judge Hanford in that case:

> "Besides the objection that the issues in the pleadings are too narrow, there is an additional obstacle in the way of obtaining equitable relief, independently of the statute; for the complain-

ants have not acquired legal titles to the land which they claim. They show only executory contracts to purchase from the state of Washington, whereby the state has covenanted to convey to each a particular tract, in consideration of full payments of the purchase price in annual installments, with interest. And if there is a controversy between the states of Oregon and Washington as to the location of their common boundary,

* * * then, while that controversy remains undetermined, there is such uncertainty as to the validity of any title which the complainants can acquire from the state of Washington as to preclude them from establishing their rights conformably to the rules of procedure in courts of equity. If their titles were complete, as they can be made by the issuance of patents pursuant to their contracts with the state of Washington, the complainants would still be barred from suing in equity, independently of the statute, by the rule which requires a plaintiff in a bill to quiet title to show by incontestable evidence that he has the legal title."

See also

Morrison v. Marker, 93 Fed. 692, 695-696.

III.

A bill to quiet a title to a portion of the public lands of the United States cannot be maintained where it appears upon the face of the bill that a controversy is pending as to the rights of the parties in such lands before the Land Department of the United States.

As we have already stated, the fact that such controversy is pending before the Land Department, appears upon the face of the bill, and in such case it has been many times declared that no such suit can be maintained.

In Sioux City & St. Paul R. R. Co. v. the United States, 34 Fed. 835, which was brought for the purpose of obtaining an injunction against the officers of the Land Office at Des Moines, and the commissioner of the general land office, from allowing proof to be made, or acted upon, necessary for the completion of the entries of certain parties, the court said that jurisdiction to entertain the bill is predicated upon the act of congress approved March 3, 1887, which was the act for the adjustment of these railroad land grants. And it was further said that the ultimate question presented to be determined by the averments of the bills, was whether the lands in question passed, under the acts of Congress, to the complainant, or still remained part of the unappropriated lands of the United States, and therefore open to entry by pre-emption and homestead, and

this, said the court, is a question that requires for its determination, the examination and construction of the acts of congress, the acts of the general assembly of the state of Iowa touching these lands, and the acts done, and work and construction performed, by complainant, and the examination of the question calls for the *exercise of judicial power* on the part of the officers of the land department, and unless the act of congress of March, 1887, confers the right upon the court to control in advance, and direct the action of the land department when called upon to act judicially, it is well settled that the power so to do by mandamus or injunction does not exist.

The case of Gaines v. Thompson, 7 Wall. 347, was then considered, and other cases referred to and cited, and coming to the question of whether the provisions of the act of March 3, 1887, had made any such radical change in the principles which had been long established by the courts, Judge Shiras said:

> "So radical a change in the relations between the courts and departmental branches of the government cannot be predicated on anything less than an express declaration by the legislative power, and certainly none such is found in the act of congress in question. The mere fact that the act provides that in certain cases suits may be brought against the United States does not tend to show that it was the purpose of congress to bestow upon the courts the right to interfere by injunction or otherwise with the action of the departments in matters requiring the exercise of judicial, as distinguished from ministerial, duties."
>
> 34 Fed. 836-838.

In Gaines v. Thompson, 7 Wall. 347, 19 L. p. 62, this question was quite fully considered, and the difference between mere ministerial duties and those which require the exercise of judgment and discretion, was clearly defined, and shown that as to those duties which were of a judicial character the courts would not entertain an appeal from the decision of the secretary nor revise his judgment in any case where the law authorizes him to exercise judgment or discretion, nor can it by mandamus act directly upon the officer, and guide and control his judgment or discretion in matters committed to his care in the ordinary exercise of his official duties. The interference of the courts with the performance of the ordinary duties of the executive departments would be productive of nothing but mischief, and that the courts were quite satisfied that such a power was never intended to be given. And that certain powers and duties were confided to those officers, and to them alone, and however courts may, in ascertaining the rights of parties in suits properly before them, pass upon the legality of their acts, after the matter has once passed beyond their control, there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action. The reason for this is, that the law reposes this discretion in him for that occasion, and not in the courts. The doctrine, therefore, is as applicable to the writ of injunction as it is to the writ of mandamus.

To the same effect are

Sloan v. United States, 95 Fed. 193-194;

Ferry v. Street, 11 Pac. 571, 575;

Brandt v. Wheaton, 52 Cal. 430;

Forbes v. Driscoll, 31 N. W. 633.

In Marquez v. Frisbie, 101 U. S. 473, 25 L. 800, 801, this court said:

> "We have repeatedly held that the courts will not interfere with the officers of the government, while in the discharge of their duties in disposing of the public lands, either by injunction or mandamus. * * * And we think it would be quite as objectionable to permit a state court, while such a question was under the consideration and within the control of the executive departments, to take jurisdiction of the case by reason of their control of the parties concerned, and render decrees in advance of the action of the government, which would render its patent a nullity when issued."

It is submitted that these authorities are of themselves sufficient to show that no such suit as this could be maintained, if the lands were public lands of the United States, and the defendants were in possession claiming the same under mining locations, while there was a controversy pending before the land department, and that it had not even so much as been brought on for a hearing, much less decided.

But we shall have occasion to cite many other authorities which will have a direct bearing upon this question when we come to treat of other controversies between these parties.

There is only one proposition connected directly with this subject, contended for by the complainant,

which we shall further notice at this point. It will be remembered that the bill alleges that the complainant's predecessor, Clarke, did publish a notice, or cause it to be published through the register and receiver, in compliance with the departmental regulations, that such an application to enter the lands had been made, and requiring all whom it concerned to appear within sixty days and present their protests or contests against it; and it is shown that within the time prescribed in this notice these parties did appear, and they did file their protest against the issuance of any patent to this applicant. And then it is alleged in the bill that this protest was insufficient to constitute any cause why the patent should not be issued to Clarke or his successor. Neither the protest itself nor its accompanying affidavits are set forth nor are they stated in substance and effect, but the plaintiff simply asserts that they were insufficient to show this, or that, and insufficient to cast a shadow upon its right to the patent, to all of which we answer, assuming that the allegations referred to amount to anything, the question of the sufficiency of the protest was a question which the Land Department had to decide, just as well as any other question involved in the case, and that this bill in this respect amounts to nothing more than filing a demurrer in the United States Circuit Court for the Ninth Circuit of the Southern District of California, to the protest before the Honorable Commissioner of the General Land Office at Washington.

IV.

On the facts set forth in the bill, plaintiff has not any title to the lands involved, legal or equitable.

We again call attention to the allegations of the bill, so far as pertain to the present question. The section of the act of congress under which the application was made is copied into the bill. Its terms are as follows:

> "That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires so to do, relinquish the tract to the government, and may select in lieu thereof a *tract of vacant land open to settlement*, not exceeding in area the tract covered by his claim or patent and no charge shall be made in such case for making the entry or issuing the patent to cover the tract selected. Provided, further, that in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements and so forth are complied with on the new claims, credit being allowed for the time spent on the relinquished claims."
>
> Trans. pp. 4-5.

This is all there is of this statute that sheds any light upon the questions involved here; and of this we may eliminate the provisions in regard to tracts covered by an unperfected, *bona fide* claim, since the only claims made here are founded upon claims to tracts covered by a patent, and the other provision is unimportant except only that if it were of consequence to inquire into the question at this point, it is submitted that there might be much room for argument that this statute

never contemplated the relinquishment of any other than agricultural lands, or any other claims than those arising under laws which required a settlement upon them.

There is not any apparent difference between the lands which were in the minds of congress in the case of those covered by a patent, and those covered by an unperfected, *bona fide* claim. But it is obvious that under that provision the lands relinquished were such as required a settlement, residence, and improvements, for the condition of exchange was that these lands selected in lieu of the unperfected claims, were to be settled upon and improved, so as to perfect the claims under the laws under which the unperfected claim had had its initiation.

But turning to the case of tracts covered by a patent, it will be noted that in every application made for a patent under that provision, several questions must necessarily arise and be determined by somebody.

1. It must appear that the tract relinquished is covered by a patent.

2. That it is included within the limits of a forest reservation.

3. That the applicant is the owner thereof.

4. That the deed of the applicant is sufficient to relinquish the tract to the government.

5. That the lands in lieu thereof, selected by him, are vacant lands, and open to settlement.

6. The lands selected must not exceed in area the tract covered by his patent.

These are the facts necessarily determined, by any

judgment which either rejects the application, or approves the selection.

Proceeding further with the allegations of the bill by which Clarke is sought to be brought within its provisions, we are told that on the 16th of November, 1899, he owned a tract of land, in fee simple, absolute, which he does not describe. [Trans. p. 5, fol. 9].

7. That for more than a year prior to the 9th of December, 1899, a certain other tract (which he does describe) was surveyed, unappropriated and vacant public land of the United States, and was open to settlement. And now note, not *that it was agricultural land*, but was *characterized upon the official records of the United States as agricultural land*, free and open to settlement and entry under the laws of the United States, and did not then contain any known mines, known salines or known minerals or known petroleum or known mineral oils, etc., and that none had ever been discovered within the limits thereof [Trans. fol. 9, par. 6].

Next, that Clarke, on the 16th of November, 1899, relinquished the lands to the government of the United States, which he referred to in paragraph V, and on the 8th day of December, 1899, delivered the deed to the register and receiver of the United States land office at Visalia, indorsed as recorded, together with his selection of the land described in paragraph VI, and filed at the same time a non-mineral affidavit, *showing the selected tract contained no known minerals*, and filed with the register and receiver an abstract *showing Clarke to be the owner thereof by title in fee simple*,

absolute, and free of any incumbrance. And showing that his said conveyance to the United States vested in the United States the full and complete title thereto. [Trans. fol. 10, pp. 5-6].

That on the 8th of December, 1899, the register and receiver received and filed the deed, abstracts, non-mineral affidavit and selection, and entered them upon the records of the land office, and then and there certified that the lands selected were free from conflict, and that there was no adverse filing, entry or claim thereto. Then we are told in broad general terms, that Clarke became vested with the *complete* equitable title to the lands so selected, and was thereupon and thereby entitled to receive a patent for the said lands from the United States. [Trans. p. 6, fol. 11, par. VIII].

The allegations with relation to the other tracts selected and patented are substantially the same, and we are told again that the complainant alleges and claims that by virtue of the allegations and facts hereinabove stated, and the law quoted and relied upon, Clarke *exchanged* the land alleged to have been relinquished by him for the lands selected, and also repeats that the full, complete and equitable title to the land selected by Clarke became, by virtue of such exchanges, immediately vested in said Clarke without further act on his part, and that he was entitled to a patent in pursuance of said selections.

It is obvious that the pleader cannot be here using the term "exchange" in its proper legal sense, for if he did make an exchange with the United States government, he did not require any patent, since the ex-

change does not take place until the titles are legally transferred from one to the other.

We are then told what the defendants claim, and why they claim it. That they were in the posssesion, working the mines, claiming under mining locations; and the defendants had filed protests against the issuance of the patent, and asking that a hearing be ordered to determine the mineral character, and that the selection by Clarke be rejected and disapproved [Trans. pp. 12-13].

And that these protests were all pending before the commissioner of the general land office.

In the 18th paragraph of the bill, commencing on page 13 of the transcript, the allegations of the complainant attacking the sufficiency of these protests will be found.

These are the facts upon which it is alleged by the complainant that the full, equitable title to these lands is vested in it. That the land department or any officer of it has ever acted upon the selections and approved either of them, or had, up to the time of the commencement of this suit, rejected them, is not pretended in any other way than this: Strenuous efforts have been made to make it appear that because, when these papers were presented to the local officers they accepted them, filed them and marked them on the tract books, this was in some way or other, a determination of the land department that the complainant was entitled to a patent, and that nothing remained to be done except simply to issue that patent in regular course of business at the land department. Where the local

officers got any authority to do these things has never been shown.

It has recently been claimed that by reason of certain acts of congress, immense powers have been vested in the local officers and that the exercise of these powers go almost, if not entirely, to constitute an estoppel against the United States. Thus an act approved March 3, 1883, directed the registers and receivers, upon application, to furnish plats or diagrams of townships showing what lands were vacant and what taken [22 Stats. at L. p. 484].

And it is said that the action of the registers and receivers in accepting these papers, and certifying to the fact that no claim appears of record, is of some tremendous significance in this controversy. But this act of 1883 certainly had no prophetic reference to the provisions of another act that was not passed for fourteen years afterwards. It was not a provision for the benefit of a particular class of applicants for the public lands, but for everybody, whether they proposed to apply, or purchase or not. And when one seeking lands under the forest lieu act consults the register and receiver for this information, he is in no better, and no different condition, than any other person seeking the same information; but as we shall show hereafter, the fact that a homestead claimant is informed that the lands are vacant and not mineral and appear to be agricultural so far as their record is concerned, does not estop the government, or anybody else from questioning the validity of the homestead entry, and so with pre-emption and every other kind of entry.

The next act which is supposed to give a greatly increased force to the action of the register and receiver is the act of January 27, 1898 [30 Stats. at L. 324] This is an amendment to section 2234 of the R. S. which was amended so as to read as follows:

> "Sec. 2234. There shall be appointed by the President by or with the advice and consent of the Senate, a register of the land office, and a receiver of public moneys for each land district established by law, who shall have charge of and attend to the sale of public and Indian lands within their respective districts as provided by law and official regulations. And receivers shall be accountable under their official bonds for the proceeds of such sales and for all fees, commissions or other moneys received by them under provision of law or official regulation."

To say nothing of the fact that other laws far more forcible in expression, so far as giving color to the supposition that they may have been intended to qualify or restrict the general supervision which the secretary of the interior and the commissioner of the land office under him have over the disposition of the public lands, have been held not to have any such effect, this amended section of the Revised Statutes manifestly has not anything to do with the case. The original section simply provided for the appointment, by the president, with the advice and consent of the senate, of a register of the land office, and receiver of public moneys for each land district. The rest has been added. That section is in chapter 2 of the R. S. under the title of "Public Lands," and it is entitled "Registers and Receivers," and their power and authority and duties generally are there prescribed. The

next chapter of the same title is entitled "Land Districts." Chapter IV takes up the subject of pre-emptions under that name. [R. S., sec. 2257].

Chapter V is entitled "Homesteads." [*Id.* 2289].

Chapter VI treats of the mineral lands and mining resources [*Id.* sec. 2318 *et seq*].

Chapter VII is entitled "Sale and Disposal of the Public Lands." And this subject is dealt with in the R. S. beginning with section 2353, the first section of which is: "All the public lands, the sale of which is authorized by law, shall, when offered at public sale to the highest bidder, be offered in half-quarter sections."

Then follows the entire scheme for sales of these lands, which sales the register and receiver are required by this amendment of 1898 to attend.

The reading of these sections upon this subject will show that the amended section was never intended to affect the supervisory powers of the secretary and the commissioner of the general land office even as to those sales, but had nothing to do with anything else.

Chapter VIII of the R. S. is on the reservation and sale of town sites on the public lands.

Chapter IX, the survey of the public lands.

(See respectively section 2380 and section 2395).

Chapter X, of bounty lands, etc.

It will thus be seen that the statute here referred to does not in any manner qualify, modify or change in any respect the laws which have been enacted for the disposition of the public lands. The administration of these laws have been committed to the department of

the interior, over which the secretary of the interior presides; next to him stands the commissioner of the general land office, and then the various assistants of his office and the local officers of the particular land districts. These constitute the tribunal to which are committed the administration of the entire system of laws for the distribution of the public lands. Occasionally an act of congress may itself make the grant in such terms as leaves nothing for anyone else to do. But such cases are exceptional. Such a thing as congress committing to a purchaser himself the power of determining his own qualifications, the character of the land which he is permitted to select, and leaving nothing for the land department of the United States to do, except to register the conclusions of his judgment, and issue a patent, has never been done.

In Knight v. U. S. Land Association, 142 U. S. 161, 177; 35 L. 974, 980, Mr. Justice Lamar said:

> "It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the government, by reason of the laws of congress or under treaty stipulations, respecting the public domain, the secretary of the interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States."

Again, in the same case, "the commissioner of the general land office, under the direction of the secretary of the interior, is authorized to enforce and carry into exercise by appropriate regulations, every part of the

provisions of this title, 'Public Lands,' not otherwise specially provided for."

In United States v. Winona & St. P. R. R. Co., 67 Fed. 948, the court, after reiterating what had been said in other cases, viz., that the secretary of the interior is charged with the supervision of the public business of the United Staes relating to the public lands, and the duties with which he was charged under the particular act there in controversy, said:

> "The land department of the United States, then, including in that term the secretary of the interior, the commissioner of the general land office, and their subordinate officers, constitutes a special tribunal, under these and other provisions of the laws of the United States, vested with the judicial power to hear and determine the claims of all parties to the public lands it is authorized to dispose of, and to execute its judgments by conveyances to the parties entitled to them. When a claim under a grant for a railroad company is made to a portion of the public lands under its control, that tribunal must determine whether or not the claimant is the beneficiary of the grant, whether or not it has so far complied with its conditions that it is entitled to its benefits, whether or not the public land claimed is a portion of the grant, and whether or not any other party has a superior right to it. When a claim is made under the homestead or pre-emption laws for a portion of the public domain that is subject to its disposition, that tribunal must determine whether or not the claimant is qualified to acquire lands under the terms of those laws, whether or not the land claimed was subject to pre-emption or to entry for a homestead, and whether or not the claimant has so complied with the requirements of those laws as to entitle him to the title to the land. Similar questions must be heard and determined by that department whenever any portion of the

public land subject to disposition by that tribunal is sold or otherwise disposed of in any way. In every case there must, in the nature of things, be a decision of questions of fact and questions of law, because in every case the ultimate question is whether or not the facts proved show that the claimant is entitled to the land, under the acts of congress. A certificate or patent is the record evidence of the judgment of this tribunal, and it necessarily follows that, when such a judgment is rendered in a case within the jurisdiction of the land department, it is, like the judgments of other special tribunals, vested with judicial powers, impervious to collateral attack."

67 Fed. 955-956.

And see

Lewis v. Shaw, 57 Fed. 516-518.

And this proposition that the administration of these laws is under the jurisdiction of the land department, that it has the power to prescribe reasonable regulations not inconsistent with law for the purpose of discharging the duties imposed upon it, and exercising the powers with which it is clothed, has been often decided by both state and federal courts. It was so decided in

Chapman v. Quinn, 56 Cal. 266;

Pope v. Athearn, 42 Cal. 607;

Germania Iron Co. v. James, 89 Fed. 811, 813-818;

Hoover v. Salling, 102 Fed. 716;

James v. Germania Iron Co., 107 Fed. 597, 600-602.

And not only has the land department jurisdiction over these matters, but that jurisdiction continues until

the patent is issued, or until that stage is reached which, in law, is the legal equivalent of a patent.

Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 592-593; 42 L. 591;
Knight v. U. S. Land Association, 142 U. S. 161;
Diller v. Hawley, 81 Fed. 651;
Hawley v. Diller, 178 U. S. 476; 44 L. 1157, 1162.

It is in the Michigan Land & Lumber Company case, *supra*, shown that the instrument which usually operates to transfer a title from the United States, is a patent. That that effect may be, however, and sometimes is, given to the act itself, or by a fair interpretation of the statute to some other act, as the equivalent of a patent. But where the granting act provides for the issuance of a patent, the rule is that the legal title remains in the government until the patent issues. Now this forest reserve law does not make anything else than the patent the equivalent of it, but it manifestly and expressly provides for a patent, and hence jurisdiction by the land department not only exists, but it continues until a patent is issued. In these cases we repeat once more, that all that had been done by this applicant was to present himself to the local office with his deed of relinquishment, his application, his abstract and his affidavit, as stated in the complaint, together with his selection. And it is submitted that it is absurd to say that upon these acts done by himself, without any action taken by the department, without any hearing having been had, or anything further being done at all, Clarke became invested with the full and

complete equitable title. As we have said before, the selector cannot determine the facts of his own qualification, the sufficiencies of his deed, whether his lands are in a forest reserve, whether the lands which he has selected are subject to selection or not. But this power is one which belongs to the land department, and it was not given over to the local officers; nobody pretends that the act attempted to confer any such power upon the register or receiver; indeed the act itself does not say anything about where the jurisdiction to determine these matters does lie. But it is unnecessary that it should, for where an act for the disposition of the public lands is passed, unless the administration of it is committed to some other specially enumerated tribunal, it comes within the scope of the jurisdiction of the land department.

Catholic Bishop of Nesqually v. Gibbons, 158 U. S. 155; 39 L. 931, 936.

While the foregoing authorities are amply sufficient, it is submitted to establish the propositions for which they are cited, we nevertheless call attention to another case upon the same subject, decided in the Circuit Court of Appeals, Eighth Circuit, viz., King v. McAndrews, 111 Fed. 860. In this case there is again repeated that the land department of the United States, including in that term the secretary of the interior, the commissioner of the general land office, and their subordinate officers "constitutes a special tribunal *vested with judicial power to hear and determine the claims of all parties to the public lands which it is authorized to dispose of, and with power to execute its judgments by*

conveyances to the parties entitled to them. A patent of land within its jurisdiction by the land department *is the judgment of that tribunal, and conveyance of the legal title to the land to the patentee in execution of the judgment.*"

"When such a patent to the land within the jurisdiction of the department is issued, it is, like the judgments of other judicial tribunals, impervious to collateral attack."

Id. 863.

The question involved in that case, as stated by Judge Sanborn, delivering the opinion of the court, was whether the Circuit Court was justified in holding a patent issued by the United States void on a collateral attack, in an action at law. And he said it presented the old question so often discussed and decided by the courts, when is a patent of the United States open to indirect attack? When is it void on its face? its face?

111 Fed. 862.

He then cites the cases in which this question had been considered, both in this court and in the Circuit Court of Appeals and Circuit Courts [*id.* pp. 862-863], and then, after what we first quoted from that case, he said:

> "The test of the jurisdiction of this tribunal is the true answer to the question, had the department the power to hear and determine the claims of the applicants of the land and to dispose of it in accordance with its decision? If that question can be answered in the affirmative, the land department had jurisdiction of the case, and the patent which evidences its decision conveys the legal title, and is impervious to collateral attack.

If it must be answered in the negative, then its conveyance is void, and is as vulnerable in a collateral action at law as in a direct proceeding in equity to avoid it.

"Land, the title to which has passed from the United States before the claim on which the patent is based was initiated, land reserved from sale and disposition for military or other like purposes, land reserved by a claim under a Mexican or Spanish grant *sub judice*, and land for the disposition of which congress has made no provision, is not intrusted to the disposition of the land department, is not within its jurisdiction, and hence its patents for such land are void on their face, and may be collaterally attacked in an action at law.

* * *

"But land which the department is vested with the power and charged with the duty to hear and decide the claims of applicants for, and to dispose of in accordance with its decision, is within its jurisdiction, and its patent of such land conveys the legal title to it, and is impervious to collateral attack, whether its decision is right or wrong.

* * *"

[Stars stand for the cases cited].

The last case cited after this passage is Barden against the Railroad Company, 154 U. S. 288, 327; 38 L. Ed. 992, 1001, and Judge Sanborn, continuing, says:

"In the case last cited the Supreme Court said:

" 'It is the established doctrine, expressed in numerous decisions of this court, that wherever congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the land department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts, and, in the absence of fraud,

imposition, or mistake, its determination is conclusive against collateral attack.'

"The test of jurisdiction is not right decision, but the right to enter upon the inquiry and to make some decision. * * * Hence a patent evidencing an erroneous decision of a question of law or a mistaken determination of an issue of fact, which the department was vested with the power, and charged with the duty, to decide, is as impervious to collateral attack as one which is the result of correct conclusions.

"The remedy for an error of law in the action of the department regarding the title to land intrusted to its disposition is by a direct proceeding by a bill in equity to correct it. * * *

"The aggrieved party has a like remedy for the wrongful issue of a patent upon a misapprehension of the facts, which is induced by fraud or gross mistake. * * *

"These established principles have been restated and these authorities have been again cited because they control the disposition of the case in hand, and because counsel for the defendants seem to be impressed with the view that every decision by the land department of the many grave and complicated issues which condition the rightful issue of a patent is a *mere ministerial act,* open to collateral attack for every error of law into which the officers of that department may fall, in every action at law in which the title under the patent is involved. 104 Fed. 432. Such is not the law. The decisions of that department are *judicial acts.* The patents it issues are judgments of a *quasi judicial tribunal.* In cases within its jurisdiction they are presumptively right, and as impervious to collateral attack for errors of law or for mistakes of fact *as the judgments of the courts,* and all cases are within the jurisdiction of this department in which congress has intrusted to it the determination of the rights of the claimants, and the disposition of the land in accordance with its decision.

"The real question in this case, therefore, is, was the determination of the rights of the claimants to the land here in controversy, and the issue of a patent to it in consonance with that decision, intrusted to this department? The contention of counsel for the defendants is that it was not, because the land was within the limits of an incorporated city when it was first entered as a homestead by the patentee. The record of the trial of the case does not disclose the facts which conditioned the decision and judgment of the department which the patent evidences, that King was entitled to the land. But the general rule is that the disposition of the public lands of the United States is intrusted to this department, and the patent itself is presumptive evidence both that the department had the jurisdiction to decide whether or not the patentee was entitled to it, if there might have been any state of facts which would have given the department jurisdiction of this case and the power to issue a patent to this land under the acts of congress, the presumption is that such a state of facts existed, and that the department had jurisdiction of the case. Upon this subject the Supreme Court said in Refining Co. v. Kemp, 104 U. S., at page 646, 26 L. Ed., at page 878, that 'a patent, in a court of law, is conclusive as to all matters properly determined by the land department, when its action is within the scope of its authority; that is, when it has jurisdiction under the law to convey the land.'"

111 Fed. 863-866.

The court then proceeds to the consideration of the particular case, and comes to the conclusion that the patent was not void, that the land department had the jurisdiction, and its conclusions were unassailable collaterally. The case contains the citation of a large number of cases in support of its conclusions.

In the Northern Pacific Ry. Co. v. Cannon, 54 Fed.

252, a decision of the Circuit Court of Appeals of the Ninth Circuit, in an opinion by Judge Hawley, these same principles are laid down. We quote in part from the opinion in this case:

> "Under the provisions of the statute we have quoted and referred to, appellant was charged with knowledge of the notice which the mineral applicant was required to give by general publication and by the posting of notices upon the claim, and of the notices required to be given by the land department, and, having failed to file any contest against defendants' application, the question thereafter—as to the mineral character of the land, whether mineral or not—became a matter between the defendants and the government of the United States. That question is one which required the exercise of judicial power and discretion upon the part of the officers of the land department, and their judgment thereon is not open to review in an action of the character made out by appellant's bill."
>
> 54 Fed. 257-258.

And Judge Hawley concludes his opinion by a quotation from the opinion of Mr. Justice Field, delivered in Steel v. The Refining Company, 106 U. S. 447, a passage from which we quote in part only:

> "Whenever mines are found in lands belonging to the United States, they may be worked, providing existing rights of others, from prior occupation, are not interfered with. Whether there are rights thus interfered with which should preclude the location of the miner, and the issue of a patent to him or his successor in interest, is, when not subjected under the law of congress to the local tribunals, a matter properly cognizable by the land department, when application is made to it for a patent; and the inquiry thus presented must necessarily involve a consideration of the *character of the land to which title is sought,* whether it

be mineral, for which a patent may issue, or agricultural, for which a patent should be withheld. * * * * * That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable, except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions."

54 Fed. 260-261.

In Barden v. Northern Pacific R. R. Co., 154 U. S. 288, 38 L. 992, Mr. Justice Field, delivering the opinion, among other things said:

"The earnest contention of the counsel of the plaintiff arises principally, we think, from an unfounded apprehension that our interpretation will lead to uncertainty in the titles of the country. If the exception of the government is not limited to *known* minerals, the title, it is said, may be defeated years after the land has passed into the hands of the grantee, and improvements of great extent and value have been made upon its faith. It is conceded to be of the utmost importance to the prosperity of the country that title to land and to minerals in them shall be settled, and not be the subject of constant and ever recurring disputes and litigation, to the disturbance of individuals, and the annoyance of the public. We do not think that any apprehension of disturbance in titles from the views we assert need arise. The law places under the supervision of the interior department and its subordinate officers, acting under its direc-

tion, the control of all matters affecting the disposition of the public lands of the United States, and the adjustment of private claims to them under the legislation of congress. It can hear contestants and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon and determine *the character of lands to which different parties assert a right;* and when the controversy before it is fully *considered and ended,* it can issue to the rightful claimant the patent provided by law, specifying that the lands are of the character for which a patent is authorized. It can thus determine whether the lands called for are swamp lands, timber lands, agricultural lands, or mineral lands, and so designate them in the patent which it issues. The act of congress making the grant to the plaintiff provides for the issue of a patent to the grantee for the land claimed, and as the grant excludes mineral lands, in the direction for such patent to issue, the land office can examine into the character of the lands, and designate it in its conveyance.

"It is the established doctrine, expressed in numerous decisions of this court, that wherever congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the land department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack."

38 L. Ed. 1001.

Again quoting from St. Louis Smelting & Refining Co. v. Kemp, 104 U. S. 651, from which quotation we extract the following:

"The patent of the United States is the conveyance by which the nation passes its title to por-

tions of the public domain. For the transfer of that title the law has made numerous provisions designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out the land department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain the title from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration and to pass upon its competency, credibility, and weight. In that capacity they exercise a judicial function, and therefore it has been held in various instances by this court that their judgment as to matters of fact properly determinable by them is conclusive, when brought to their notice in a collateral proceding. Their judgment in such cases is like that of other special tribunals upon matters within their jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands under the law is intrusted, that all the requirements preliminary to its issue have been complied with."

38 L. Ed. 1002.

Again:

"The land department, as we have repeatedly said, was established to supervise various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of congress are fully complied with. Necessarily, therefore, it must consider and pass

upon the qualification of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation."

Id. 1002.

Much more of the same opinion will be found to the same effect. We have quoted thus largely from the last few cases cited for the reason that we submit that these cases do determine beyond all question certain propositions. They are:

1. That the land department constitutes a special tribunal having jurisdiction over matters pertaining to the disposition of the public lands of the United States, of all kinds.

2. That it is not deprived of that jurisdiction merely because a particular statute does not specially commit the jurisdiction to that department, but it has the jurisdiction unless the statute explicitly takes it away and confers it upon some other.

3. All acts of congress providing for the disposition of lands as a class or classes, by certain modes and prescribing the qualifications of purchasers, or the conditions upon which a purchase is to be made, do necessarily call for the judgment of this tribunal upon the existence of those facts, qualifications and conditions, and whether the law has been complied with or not.

4. Its proceedings in this respect are judicial in character, and its determinations are judgments of a special tribunal created for that purpose, and having the like effect with judgments of other special tribunals.

5. That an equitable title does not pass ever until

there has been a decision of that special tribunal upon these questions, and it has been determined that the applicant possesses the qualifications of a purchaser, that he has complied with the terms of the statute; that the lands which he seeks to purchase are of the class which he is entitled to purchase. And furthermore, the decisions of the court upon the questions which are involved in this case, wherever it is held that an equitable title has vested, are put upon the ground that such a determination has been made. Mr. Justice Field shows, in the Barden case, that the statute excepted mineral lands from the operation of the grant to the railroad company; that necessarily, therefore, in order to obtain a patent from the United States for these lands, the investigation must be had and the determination must be made by this special tribunal, that the lands are not mineral. And when that judgment is made, then under the operation of the grant, the railroad company becomes entitled to a patent, and it never was before. Mr. Justice Field also makes some remarks substantially to the effect that these duties may not always be performed by the land department with that care that is really called for, but no matter whether carefully or carelessly done; how imperfect, or how perfect, may have been the investigation, when the judgment comes that the lands are of the character to which the railroad company was entitled, or any other person under any other act is entitled, then for the first time does the equitable title vest, provided, of course, that that determination also determines all other facts or conditions upon which the party is entitled to a patent, and if anything is to be paid, it must have been paid, and when that is done, there remains nothing except to issue the patent in due course. It is true that the matter is still under the jurisdiction of the department. It is true that it may be called in question after

that judgment. But no discovery of mineral when one is seeking to obtain the title to lands under acts from which the mineral lands are excluded,—no discovery of mineral made after that judgment,—can have any effect. It may be shown that the evidence upon which its non-mineral character was proven is false, and it was known to be mineral land at the time the applicant was making his proof; or in other words, that that judgment had been procured by fraud, in which case the department itself can set it aside and order a further investigation. Not only are these doctrines supported by the authorities which we have quoted and which we have cited, but there are a large number of others cited in those cases, all substantially, either explicitly or by plain logic, driving to the same conclusion. Under these railroad grants or grants to the states in aid of railroads, and indeed in any of the other grants to the states where the power of selection is given, it is explicitly determined that the selection is not made until it is approved; it does not consist of the mere designation by the applicant for the purchase of the lands which he desires, but when he has made that designation, then the duty of the land department begins, and when it is by them determined that the lands are subject to selection, this is the determination of the matter, and the selection is then complete, and not until then.

In Chicago, Milwaukee & St. P. Ry. Co. v. Sioux City, etc., R. R. Co. *et al.*, 117 U. S. 406, 29 L. 928, the controversy arose out of adverse claims to land by two different railroad companies, which lands had

been granted to the state of Iowa to aid in building these roads; the act granting for the aid of each road, every alternate section of land designated by odd numbers, etc., and in the event that the odd sections had been disposed of when the roads were definitely located, the usual grants of lands in lieu of them should, by the secretary of the interior, be caused to be selected provided they were in no case located more than twenty miles from the lines of the roads. And the controversy was over lands selected by each of the companies under this latter provision. The court held that while the definite location of the road might affect the priorities of the companies in some respects as to lands within the primary limits, no such priority could be obtained by such means as to the lands within the indemnity limits because, as to those lands no title was vested until a selection was made by which they were pointed out and ascertained, and the selection approved by the Secretary of the Interior.

29 L. p. 929.

In Wisconsin Central Ry. Co. v. Price Co. and others, 133 U. S. 496, 33 L. 687, after holding that lands which lay within the primary limits were identified by the definite location of the road, and the title attached to them, and they were subject to state taxation, said:

> "But as to the remainder of the lands taxed, which fell within the indemnity limits, the case is different. For such lands no title could pass to the company, not only until the selections were made by the agents of the state appointed by the governor, but until such selections *were approved by the secretary of the interior* The agent of the

state made the selections, and they had been properly authenticated and forwarded to the secretary of the interior. But that officer never approved of them. Nor can such approval be inferred from his not formally rejecting them. He refused, as already stated, to issue to the company any patents for any more lands, insisting that it had already received over 40,000 acres too much, and he directed the commissioner of the general land office to require the company to restore this excess to the government. The approval of the secretary was essential to the efficacy of the selections, and to give the company *any title* to the lands selected. His action in that matter was not ministerial, but judicial. He was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and in the second place whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. And in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and, if so, what portion had been thus appropriated, and what portion still remained. This action of the secretary was required, not merely as supervisory of the action of the agent of the state, but for the protection of the United States against an improper appropriation of their lands. *Until the selections were approved there were no selections in fact*, only preliminary proceedings taken for that purpose; and the indemnity

> lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identification. The proposed selections remained the property of the United States. The government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the cause mentioned. But such promise passed no title, and, until it was executed, created no legal interest *which could be enforced in the courts.* The doctrine, that until selection is made no title vests in any indemnity lands, has been recognized in several decisions of this court."
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> 33 L. 694-695.

There is much more to the same effect in this opinion, and many cases cited in support of the doctrine there announced.

Now, under the forest lieu act which we have before quoted, there can certainly be no pretense that any title, legal or equitable, to any portion of the public domain was vested in any person merely because he was the owner of a tract of land covered by a patent within the limits of the forest reservation. The privilege which the government offered was that of relinquishing the land which he owned under such patent, and selecting a tract "vacant and open to settlement of equal area." And certainly no right could accrue until the selection is made. But when is it made? The presentation of these papers to the local officers with the designation of the lands desired by the party relinquishing a tract in a forest reserve to the United States is, as was said in the case last cited, merely the preliminary steps taken for the purpose of making a selection, and they do not vest any title in the applicant,

legal or equitable. Nor does any title vest until the selection is approved. No distinction can be made between the cases cited and the case now before this court. No mere trifling differences in the language can make any difference in the principle. If another act does specifically declare that the secretary of the interior must approve the selection, or that the secretary of the interior is to cause the selection to be made, and thereby impliedly require his approval, then, of course, the conditions upon which the title is to vest must be complied with. But if nothing be said in the act concerning the tribunal by which it is to be determined that the conditions upon which the right to the United States patent is to be issued exist, then, as we have already shown, that power resides in the land department, and while possibly an approval by the commissioner of the land office would be sufficient unless the case were taken before the secretary of the interior by appeal, or unless he should, in the exercise of his supervisory power without appeal undo the action of the commissioner, as it has been many times decided that he may, then the commissioner's decision might be, and doubtless would be, sufficient, and upon it a patent would issue. But it is not true in this case that the applicant may, of his own motion, or can by his own act, clothe himself with either a legal or equitable title. And it is not until his relinquishment is accepted as sufficient and his selection approved as being of land subject to selection, that any interest vests in him. Much has been attempted to be made by our adversaries out of the expression of the land department in

one or two cases in which they have referred to this act as an offer by the government of the United States to exchange, and have spoken of the relinquishment by the applicant, and the designation of land sought in lieu thereof, as an acceptance of such offer, and by such action, an exchange has been effected. But in those cases it will be seen that the land department has added, "If the lands selected were subject to selection."

Thus in McDonald's case, 30 L. D. 124, while the secretary seems to have treated the matter in this manner, nevertheless he directed the commissioner of the general land office to carefully examine the papers and records pertaining to this selection, *and if it is found to be otherwise free from objection,* the fact of the elimination from the boundaries of the forest reserve, of the lands in lieu of which the selection is made, after full compliance by the claimant with the lieu land act and regulations, will not prevent approval of the selection.

Id. p. 125.

This manifestly meant that if the papers were not otherwise free from objection, no right to the land would exist. In other words, until the entire matter was investigated and the selection approved, the title did not vest and no exchange was affected.

In the case of Clark v. the Northern Pacific Ry. Co., 30 L. D. 145, 148, after referring to, and quoting from McDonald's case, the acting secretary said:

> "The same principle announced in the case of McDonald applies in the case at bar. If the land selected *was subject to selection at the time he made selection thereof*, and if, as appears to have

> been the case, the lands embraced in his deed of relinquishment and reconveyance were proper bases for his selection, he acquired at the time of filing such selections and deed of relinquishment and reconveyance, vested rights in the execution by the government of its part of the contract for the exchange of lands. The lands embraced in his selections were, therefore, not subject to the said withdrawal, having been previously appropriated and segregated from the other public lands in the said township by such selections."

But all this depends upon the "if." In order to have this effect, the land selected must be subject to selection at the time the application was made.

So that the decisions relied upon do not show that the land department was of the opinion, that any sort of a right accrued by the application unless the conditions upon which that right depended existed.

Furthermore, in the McDonald case, the objection was that after McDonald made the application based upon the relinquishment of a tract of land then covered by forest reservation, the president had, by his proclamation, restored a part of that reservation to the public domain, which part included the lands which McDonald had relinquished. And the claim was, that as it had since ceased to be within a forest reserve, therefore the right to exchange had also ceased. The whole point in that decision was that so far as the government of the United States was concerned, the lands, when McDonald made the relinquishment and made the selection, the right of selection existed, and the withdrawal of a part of the forest reserve including the lands to which he had made the deed of relinquishment by the government afterwards would not

defeat his right. But it is obvious from the opinion that the department considered that the law had been complied with in every respect and the lands were subject to selection.

Clark's case arose under an entirely different act, namely, the act of March 2, 1899, and which limited the right of selection by the company to lands to which no adverse right or claim should have attached, or been initiated at the time of making such selection. And Clark's claim having attached prior to any valid selection of the land by the company was held to be superior to the claim of the company, so far as the controversy between those two was concerned, but this was put upon the express condition that the lands selected by Clark were subject to selection at the time he made it.

It is submitted, moreover, that the language employed by the department if intended to be technically accurate is not justified by the act. This is no more an offer to exchange on the part of the government, than the right of a railroad company to make a selection where lands in the primary limits have been disposed of, or for some other reason, do not vest in the company. And the mere designation of a tract in lieu of the forest reserve land no more makes a contract between the applicant and the government than the designation of lands by a railroad company within the indemnity limits in lieu of those lost in the primary limits makes a contract between the railroad company and the government. It is no more in the nature of an offer on the part of the government than the pre-emption or homestead laws, and it never has been held that

because a pre-emptioner or homestead claimant has been permitted to file a claim in the local land office, he has accepted an offer of the government and entered into a contract with it with respect to the lands so taken.

Subsequently to the commencement of these suits, the controversies which were at the time of the commencement pending in the land department were decided by the department, and the selections were rejected.

Kern Oil Co. *et al.* v. Clark, 30 L. D. 550; and
Gray Eagle Oil Co. v. Clark, *id.* 570.

In these cases it was held by the department that mineral lands were not subject to selection, and by repeated decisions of this court they are not subject to sale under any laws other than those which provide for the disposition of the mineral lands. And as it appeared to the secretary of the interior that these lands were mineral lands, and that they were not vacant at the time that these selections were made, they were rejected. Of course, the very bills which were filed in these cases show that the lands are mineral lands, and that because they are, and these defendants were actually engaged in mining them, and removing the mineral products therefrom, the suit was brought, and brought to restrain those mining operations. The lands, therefore, were not subject to selection under this forest lieu law.

Under no law of congress that we are aware of, the administration of which is committed to the jurisdiction of the land department, whose duty it is to de-

termine the existence of the conditions upon which the right of an applicant to enter the lands depends, was it ever held that any right vests by the mere presentation of the application or selection, or by any other act of the applicant. "Persons who come upon the public lands with a view to cultivate now and to purchase hereafter, possess no rights against the United States except such as the acts of congress confer; and these acts do not confer on the pre-emptor *in posse*, any right or claim to be treated as the present appropriator of the land in relation to the government." "Mere entry upon the land and continued occupancy and improvement give no vested interest in it. It merely gives the privilege of pre-emption, which is a privilege conferred on the settler to purchase land in preference to others. It protects him from intrusion, or purchase by others, but confers no right against the government. The land continues subject to the absolute disposing power of congress until the settler has made the required proof of settlement, and improvement, and paid the requisite purchase money."

Frisbie v. Whitney, 76 U. S. 187; 19 L. 668, 671.
Hutchings v. Low et al., 82 U. S. 77; 21 L. 82, 85-87.

"The rule is well settled * * * that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract, is to be regarded as the equitable owner thereof, and the land is no longer open to location. * * * This was laid down as a principle in the case of Lytle v. Arkansas, 9 How. 314,

and has ever since been adhered to. * * * Subsequent cases which have seemed to be in conflict with these have been distinguished from them by the fact that something remained to be done by the claimant to entitle him to a patent; such as the payment of the price, the payment of the fees for surveying, or the like."

Wirth v. Branson, 98 U. S. 118; 25 L. 86, 87.

These cases are also followed in Campbell v. Wade, 132 U. S. 34; 33 L. 240. Mr. Justice Field, in delivering the opinion after stating the proposition that the occupation with the intention to purchase did not confer a right upon the pre-emptioner against the government of the United States, and citing the authorities, said:

"This subject was fully considered in Frisbie v. Whitney * * *where this doctrine was announced. It was subsequently affirmed in the Yosemite Valley case, Hutchings v. Low * * * where the court said that until all the preliminary steps prescribed by law for the acquisition of the property were complied with, the settler did not obtain any title against the United States, and that among these were entry of the land at the appropriate land office and payment of its price. 'Until such payment and entry,' the court said, 'the acts of Congress give to the settler only a privilege of pre-emption in case the lands are offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others. The United States by those acts enter into no contract with the settler, and incur no obligation to anyone that the land occupied by him shall ever be put up for sale. They simply declare that in case any of their lands are thrown open for sale the privilege to purchase them in limited quantities, at fixed prices, shall be first given to parties who have settled upon and improved them.'

"In the present case, before the act withdrawing

> the lands from sale, which was equivalent to a repeal of the act authorizing the sale, could be held to impair any vested right of the applicant, he must have done everything required by law to secure such right. Until then no contract could arise in any way binding upon the state. No contract rights of the petitioner were therefore violated by its legislation."

Other cases which will be cited for other purposes, do also confirm this doctrine, and we submit that those already cited establish the propositions which we have before stated, and that if the mere presentation of this deed, application and affidavit to the local officers had the effect of vesting any title, legal or equitable in advance of the investigation by the department and its determination that the facts upon which that right depended exists, it must be because the act under which this claim was made is taken out of the supervision of the land department, and especially of the Secretary of the Interior and the Commisioner of the land office. No such construction can be placed upon this act. As above stated, we have quoted here all there is of the act upon this subject. No light is shed upon its meaning in any other provision of that act, and if therefore it be left to stand alone, separate and apart from the general system provided for the administration of the laws for the disposition of the public lands, it offers not the slightest suggestion of any proceeding to be taken to effect this exchange, nor to whom such application is to be made. The very proceedings taken in the land department shows that our adversaries do not so construe it. They evidently understood that it was to the land department that they were to make application for

this exchange, and the only authority they had for presenting anything to the local officers was found in the regulations of their superiors. Had it not been for the very regulations, the validity of which they now challenge, they had not a hint anywhere of the right to present the application to the local officers. But this act is not to be construed separate and apart from the laws of the United States for the disposition of the public lands. These laws are all parts of one system, and are to be construed together. Attorney General Wirt, in his opinion upon the act of the relief of Alfred Flourney, said:

> "The laws upon the subject of the public lands are all *in pari materia*, and are all to be construed together; and an authority to an individual to make an entry of any of these lands is not to be considered as an insulated act, to be expounded strictly upon its own letter; but as having relation to the general system, and to be expounded according to the meaning of Congress, to be collected from the language of the particular law as compared with the whole system, and from the reason and nature of the case."
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> II. Opinions of Attorney General, 44, 46.

And such has been the uniform and universal rule observed by this court in the interpretation of any of these acts. It is obvious that it is assumed in the Bishop of Nesqually case, where it was held that it was not neccessary for an act of Congress providing for the dispositinon of a part of the public lands to confer the jurisdiction upon the land departments specifically, but the jurisdiction resided there unless the act did itself provide another tribunal. The acts of Congress

are sufficient of themselves to show that such must be the rule of interpretation.

In Orchard v. Alexander, 157 U. S. 372; 39 L. 737, the court considered thoroughly the question of the power of the Commissioner and of the Secretary over the local officers, and referred for this supervisory power to section 441, of the Revised Statutes, wherein it was declared that the Secretary of the Interior is charged with the supervision of public business relating to the following subject: "(1) * * * 2—"The public lands, including mines," and to section 453, which provides that the "Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and also such as relate to private claimants of land, and the issuing of patents for all the grants of land under the authority of the government." And to section 2478 of the Revised Statutes of the United States, wherein it is declared that the "Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution by appropriate regulations, every part of the provisions of this title not otherwise specially provided for." The "title" referred to is Title 32, which has for its subject "The Public Lands," (R. S. p. 390), and shows that these provisions do vest this supervisory power, and furthermore quote approvingly from Knight v. The United Land Association, 142 U. S. 161, 177,

that portion of the opinion of Mr. Justice Lamar in which he says that this power of the Secretary of the Interior does not depend upon an appeal taken to him, but it may be exercised directly through his own orders. And in this case it was further said:

> "While it is within the discretion of Congress to segregate any particular step in the proceedings for the disposal of the public lands from the scope of the general system, and place it outside of and beyond any supervising control of the higher officers, yet the court should be satisfied that the language indicates an intention on the part of Congress so to do, before any such break in the harmony of the system is adjudged."
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> Orchard v. Alexander, 39 L. p 742.

In Michigan Land & Lumber Company v. Lusk, 168 U. S. 589, 42 L. 591, already cited, and wherein it was held that the legal title remains in the government until the issuance of a patent, and the power of the land department to inquire into the extent and validity of the rights of the claimant against the government does not cease until the title has passed, does also furnish another illustration of the principle that the intention of Congress to break the unity of the public land system and its administration must very distinctly appear in order to justify the conclusion that such an intention existed. That case related to claimants of swamp lands in the state of Michigan. Many acts, both of the state and of the United States had been passed in relation to the surveys of the swamp lands, and among others was the act of March 3, 1857, 11 Stats. at L. 251, passed by the Congress of the United States, which provided that the selection of swamp and overflowed land, granted to

the several states by the act of Congress, heretofore made and reported to the Commissioner of the General Land Office, so far as the same should remain vacant and unappropriated, and not interfered with by an actual settler under any existing law of the United States," be, and the same are hereby confirmed, and shall be approved and patented to the said several states in conformity with the provisions of the act aforesaid, as may be practicable after the passage of this law." With the proviso that nothing in the act contained should interfere with the provision of the act of Congress entitled, "An act for the relief of purchasers and locators of swamp and overflowed lands," approved March 2, 1855, and it was contended by the plaintiff that this act of 1857, had for its purpose and effect the confirmation to the state of Michigan of the title to all lands marked on the approved and certified list of January 13, 1854, as swamp and overflowed lands, and to direct the issue of a patent or patents therefor. That whatever question might have existed, were it not for this act, as to whether any of the lands marked on such lists were swamp and overflowed lands, and whatever authority there might otherwise be in the land department to make corrections, Congress, which had full power over the matter, in terms granted to the state these lands; such action by Congress was a finality; and that thereafter no inquiry could be made as to the character of the lands, no correction in the lists, and the full, equitable title passed to the state beyond the possibility of challenge. That Congress must have known of the alleged irregularities in the surveys,

known of the approval by the Secretary of the Interior of this list, that it had been forwarded to the Governor; that the Governor had accepted and requested the issue of patents; and with this knowledge passed this act, intending thereby to remove all question as to the character of the lands, to put an end to the necessity of any further examination, and to make this list the single and absolute evidence of the lands it was granting to the state of Michigan.

But the court did not sustain this contention, but referred to the act of 1850, granting the swamp and overflowed lands, and directing the Secretary of the Interior, as soon as practicable, to make an accurate list and plat of such lands, and transmit the same to the Governor, and thereafter, at his request, to cause a patent to be issued, they said that the manner in which the Secretary should discharge this duty, the evidence that should be required by him as to the character of the lands, were not prescribed by the act, but left to his discretion. They then proceeded to state what he had done in this particular instance, and with reference to these lands the court said:

> "The effect of this legislative action was not to make an erroneous survey conclusive nor to preclude the Land Department from the exercise of its unquestioned jurisdiction to correct surveys, but simply to accept the field notes finally approved as the evidence of the lands passing under the grant, leaving to the Land Department to make any needed corrections in the surveys and field notes * * * * Now, the obvious purpose of this act of 1857 was to ratify and confirm the various steps taken by the Secretary of the Interior, in the selection of swamp and overflowed lands. It was gen-

> eral in its terms, reaching to all the states, and the different modes by which identification of the swamp and overflowed lands had been attempted to be accomplished. It cannot fairly be construed as intending to put an end to all further inquiry in the Land Department, nor to oust that department of jurisdiction to inquire into and correct any frauds or mistakes, but was a general ratification and confirmation of the methods pursued * * * * * * It was not an act to enlarge the grant of 1850. It was not an act to oust the Land Department or its ordinary jurisdiction to inquire into and ascertain what were swamp and overflowed lands, but was an act confirming and ratifying the methods thus far pursued."
>
> 168 U. S. 599, 603; 42 L. 594, 596.

But what is there in the act now under consideration at all comparable with this act of 1857, in the suggestion of an intention to oust the ordinary jurisdiction of the Land Department in cases arising under it?

As bearing further upon this question see Hawley v. Diller, 81 Fed. 651, 654, 655; Diller v. Hawley, 178 U. S. 476, 44 L. 1157, 1162.

Now, when these cases were decided by the Land Department, and these applications were rejected, they were decided upon the very ground that the complainant in this suit had not done the things which he was required to do in order to have vested in him any equitable title.

A motion was made for a rehearing in these cases, or for a review of the decision of April 25, 1901, and upon this motion the parties were again heard before the Department of the Interior, both upon briefs and oral argument. And on the 12th day of April, 1902, the Honorable Secretary remained of the same opin-

ion, and the motion for the review was denied. (See decisions relating to the public lands of April 12 and 16, 1902, in the Kern Oil Co. *et al.* v. Clarke, and the Gray Eagle Oil Co. v. Clarke, pp. 1-16; and Gray Eagle Oil Co. v. Clarke, *id.* pp. 16-24). These pages have not yet been bound so far as we are advised, and we cannot therefore refer to the volume and page in the Land Decisions.

The decisions which have been referred to have been repeated time and again, and the principle applied in all sorts of cases.

In Abercrombie's case, 6 L. D. 393, it was held that to defeat a homestead claim where a final entry had been made, upon the ground that the land was mineral, there must have been a known mine upon it *at the date of the sale*, and thereby implying what has many times been decided, that if, at the time of the sale, which is the final entry, a mine had been discovered upon the land, the homestead claim would be defeated. In other words, that the homestead claimant had no vested title until the sale.

In Spratt v. Edwards, 15 L. D. 290, 291, it was held that while the original application of a homestead claimant, when allowed, is termed an "entry," yet it is not such an entry as can be said to amount to a sale until completed by compliance with the law on the part of the entryman, and satisfactory proof thereof furnished by him, and the issuance to him by the local officers of the final receipt, which amounts to a sale so far as the mineral character of the land is concerned in agricultural cases. And furthermore, that a decision that

the land is not mineral in character, though final and conclusive upon the parties, it only becomes so up to the date of the trial. It had no relation to the discovery of minerals that might thereafter be made prior to the time the government parts with its title to the tract. And that if it were true that such valuable minerals had been discovered on the tract since the hearing as would make its mineral character appear there was no objection to the mineral claimant or other proper party protesting the new proof on that ground, to have an opportunity in a proper manner to show its mineral character.

Id. 292.

In Stinchfield v. Pierce, 19 L. D. 12, it was again decided by the department that a final decision that a particular tract is non-mineral, though conclusive up to the period covered by the hearing, does not preclude a further consideration as to the character of the land based on subsequent exploration and development. This was upon a contest of a homestead entry when the entryman appeared to make his final proof.

To the same effect is Zadig v. Central Pacific R. R. Co., 20 L. D. 26. Barnstetter v. Central Pac. R. R. Co., 21 L. D. 464, 466.

In Walker v. Southern Pacific R. R. Co., 24 L. D. 422, it was held that prior to the approval of a railroad indemnity, the land included therein, if mineral in character, is open to exploration and purchase under the mining laws of the United States.

In Swank *et al.* v. State of California *et al.*, it was held by the Department of the Interior that prior to

the approval of a school indemnity selection, the land included therein, if mineral in character, is open to exploration and purchase under the mining laws of the United States.

27 L. D. 411.

It was there said, among other things, that the law governing the right of the State to indemnity school land is in every essential respect similar to the law governing the right of a railroad company to select indemnity lands under its grant.

27 L. D. 413.

And the Department applied the same principle declared in Wisconsin R. R. Co. against Price, *supra*, viz, that there was no selection until it was approved.

The same point was decided in McQuiddy *et al.* v. State of California, 29 L. D. 181.

In Harrell's case, 29 L. D. 553, which was an application made under this same statute for the exchange of property, and in which the selection had been approved by the Department, it was said that that selection did vest an equitable title in Harrell, which ought not to have been disturbed upon any other grounds or in any other manner than that in which a final entry would be disturbed, and the Honorable Secretary said:

> "The exchange became complete in contemplation of law *upon the approval of the selection*, and it ought not to have been disturbed in a manner different from that in which a final entry would be disturbed. The government was fully reinvested in that title to the lands in the Sierra forest reserve relinquished by Harrell, and he acquired a vested right in the lands he had selected outside such reserve. He only needed a patent

> from the United States to invest him with the full legal title, and the patent, when issued to him, would relate back to the *date of the approval of the selection.*"
>
> *Id.* 554.

In Henshaw v. Wallace, it was held that in order to defeat a pre-emption entry on the ground of the mineral character of the land, it must be shown that the mineral was known to exist at the date of the entry.

13 L. D. 108.

But the entry there referred to was, when the final proof was made and payment, and the certificate issued. And it makes no difference whether there is any contest in the case, or whether the proof is made *ex parte.*

Royal K. Placer, 13 L. D. 86, 89.

And in Jones against Driver, 15 L. D. 514, it was held that before the final certificate issues, a homestead entry is open to attack on the ground that the land embraced therein is mineral in character, without regard to the date of the alleged mineral discovery. And this was put upon the ground that although the original entry by the homestead claimant may be said to be a homestead entry, it is not such an entry as can be properly called a sale until it has been completed in accordance with law by making final proof, paying the commissions and the issuance by the proper officers of the final certificate, as the basis of a patent.

And in Rea *et al.* against Stevenson, 15 L. D. 37, it was decided that the conditions existing at the date of final entry determined whether the land should be ex-

cluded from homestead entry on account of its alleged mineral character.

So it has been held in substance with reference to town sites, that where a patent has been issued for a town site, if there were mines known to exist at the date of the entry, a patent ought not to issue, and that if it had issued, the investigation might be had for the purpose of taking steps to cancel the patent.

Thomas J. Laney's case, 9 L. D. 83.

Plymouth Lode, 12 L. D. 513.

These cases, too, were nearly all decided at a time when the acts of Congress excepted from lands subject to pre-emption, known mines and salines.

Revised Statutes, sec. 2258, sub. 4. This provision, excepting lands on which were situated any known salines or mines, was originally made in the pre-emption laws, and carried into the Revised Statutes in the chapter on pre-emption. When the homestead law was passed, it subjected to selection any unappropriated public lands which at the time the application was made, were subject to pre-emption.

R. S., sec. 2289.

By the act of March 3, 1891, entitled "An Act to repeal timber-culture laws," 26 Statutes at Large, page 1095, the pre-emption laws were repealed, except certain sections of the Revised Statutes not at all material to the present question. (See sec. 4 of the act, 26 Stats. at L. 1097).

And section 2289 of the Revised Statutes, the first section that relates to homestead entries, was amended by the same act, leaving out the provision giving the

right to enter lands subject to pre-emption, and giving the right to enter a quarter section or less quantity of unappropriated public lands under the homestead law. And in section 17 it was provided that the provision in the act of June 30, 1891, making appropriation for sundry civil expenses of the government, which declared that no person who should thereafter enter upon any of the public lands with a view to occupation, entry or settlement under any of the land laws should be permitted to acquire title to more than 320 acres in the aggregate under all said laws, should be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person, only agricultural lands, and not to include lands entered or sought to be entered under mineral land laws.

Id. 1101.

Furthermore, Section 2303, relating to homestead entry, which declares that no distinction shall be made in the construction or execution of this chapter on account of color, nor shall any mineral lands be liable to entry and settlement under its provisions, was left in full force.

And in the act to provide for the survey of public lands in California and the granting of pre-emption rights therein, approved March 3, 1853, it was provided in section 6 that all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections 16 and 36, which were granted to the state for school purposes, and with the exception of lands appropriated under the authority

of this act, were reserved by competent authority, and excepting also the lands claimed under any foreign grant or title, and the *mineral lands,* shall be subject to the pre-emption laws of the 4th of September, 1841.

10 Stats. at Large, p. 246.

And it has been decided by this court that it had been, prior to 1866, the policy of the United States, in all the acts of Congress for the disposition of the public lands, to reserve the mineral lands, and that this policy was changed by that act of July 26, 1866, which declared the mineral lands of the public domain free and open to exploration and occupation, etc., and prescribed the proceedings whereby the title thereto might be obtained.

Deffebach v. Hawk, 115 U. S. 392; 29 L. 423, 425-426.

And after considering the provisions of this law to some extent, the court, speaking by Mr. Justice Field, said:

> "It is plain from this brief statement of the legislation of Congress that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar or copper can be obtained under the pre-emption or homestead laws, or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the states of Michigan, Wisconsin, Minnesota, Missouri and Kansas."

He further explained the meaning of the terms which he was employing. He said:

> "We say 'land known at the time to be valuable for its minerals,' as there are vast tracts of public

land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral' in the sense of the statute is applicable. In the first section of the act of 1866 no designation is given of the character of mineral lands which are free and open to exploration. But in the act of 1872, which repealed that section and re-enacted one of broader import, it is 'valuable mineral deposits' which are declared to be free and open to exploration and purchase. The same term is carried into the Revised Statutes. * * * We also say lands known at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles *which may be issued for other kinds of land, in which years afterwards rich deposits of minerals may be discovered.* It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the government under the preemption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We, therefore, use the term known to be *valuable at the time of sale,* to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed *when the entry of them was made and the patent issued.*"

Deffeback v. Hawke, 29 L., pp. 426,427;

Sparks v. Pierce, 115 U. S. 411; 29 L. 428;

Davis v. Wiebold, 139 U. S. 515, 517; 35 L. 238, 242.

And from the cases already cited, and many others, it follows that it is not until there is this judgment of the land department that the lands are of the character sought to be purchased or selected, that any title vests.

In New Dunderberg Min. Co. v. Old *et al.*, 79 Fed. 598, it was held by the Circuit Court of Appeals of

the Eighth Circuit that a patent to land or mineral lodes within the jurisdiction of the land department, conveys the legal title to the property, and constitutes a judgment of that tribunal upon the questions involved in its issue.

And this is also ruled in Northern Pacific R. R. Co. v. Cannon, 54 Fed. 252, 257-261.

Again, while these lands are said, in the bill, to have been for more than one year prior to the 8th of December, 1899, surveyed, unappropriated and vacant public land of the United States open to settlement, etc. [Trans. pp. 6-7, par. X of the bill]; and though the same allegation is made with respect to the condition on the 13th of January, 1900 [Trans. pp. 8-9, par. XIII] it will nevertheless be noted that plaintiff does not allege that any affidavit or any proof was made or offered to the department that the lands were vacant at either period. It alleges the making of the deed, and presenting it, and an abstract of title, and the application for the selection, and the non-mineral affidavit. [Trans. pp. 5-6, par. X]. And at the time of making what it chose to call its amended application, it alleges the presentation of an abstract showing title in Clark and the non-mineral affidavit, but says nothing about any proof of the lands being vacant. [Trans. p. 8, par. XIII of the bill]. And the same allegations are made with respect to both of Clark's applications. The explanation of the failure to file this affidavit is to be found in the view which counsel took of the act of June 4, 1897, and of the meaning of this word "vacant," which they have continuously insisted meant

"unappropriated" on the records of the land office, and that therefore the question of whether they were or were not "vacant" was not determinable by an affidavit, but by an inspection of the records, and that as there was no claim of record in the land office at Visalia to either of the tracts selected, they were therefore vacant within the meaning of that statute. This is still further shown in the bill because it is distinctly alleged that the parties under whom these protestants claim or base their right to the premises upon some one or more of four certain pretended placer mining locations, and then it is said that these placer mining locations were, and each of them was, illegal and void, and the complainant proceeds to state wherein their invalidity consisted, but does not attack the location of these lands upon that ground. It is alleged that they were invalid because no discovery of mineral had been made within the boundaries, or petroleum oil; that one was invalid because it embraced more than 160 acres of land; another for the same reason; another ground of invalidity was that they were located by the same eight persons upon the same date, and such tracts were contiguous, which was supposed to be in violation of the policy of the laws of the United States, and Surplus No. 1 was claimed to be invalid because it purported to be the west ½ of lots 1 and 2 of the N. W. ¼ of sec. 30, whereas said N. W. ¼ of said section is divided into lots 1 and 2, the most easterly 80 acres being lot 1, and the most westerly 85.17 acres being lot 2, with a similar attack upon Surplus No. 2. [See Trans. par. XVI of the bill, pp. 10-12].

It will thus be seen that it is not claimed that these locators did not go upon this land and locate the same, marking the location in such a way that its boundaries could be easily and readily traced, or that they had abandoned it, or that they had not posted notices and done whatsoever was necessary to constitute the location of the land. And it is shown distinctly in the bill that they were in the possession, working the same, at the time that the bill was filed, and had been engaged there for some time before, and that they had not only made a discovery of the oil, but were working it at great profit. And the contention has been, as said before, that the lands were not vacant because they were not appropriated on the records of the Visalia office. And it has been claimed, and was contended in the Circuit Court of Appeals of the Ninth Circuit, that this word "vacant" had, in the acts of Congress and of the public official documents of the land department, and in the judicial decisions, both federal and state, acquired a meaning, and that meaning was such as above stated, namely, that vacant lands were lands to which no claim under some law of the United States had been filed in the proper land office. No such meaning has been attached to this word by any uniform usage, either in the acts of Congress nor judicial decisions. It is not denied, of course, that the term "Vacant" may be used in the sense claimed by our adversaries, and is so used sometimes. But, whenever it is so used, the context plainly points the meaning. Thus, in the reports of the secretary of the interior or other officer of the land department giving information concerning the

lands which have been appropriated, and those which were vacant, the term "vacant" when used must, of course, refer to what appears upon their own records, for as to the actual condition of the land, outside of those records the department knows no more than other persons.

In Shaw v. Kellogg, 170 U. S. 312, 332; 42 L. 1050, 1057, the court had under consideration the act of Congress in relation to the Baca heirs. These heirs of Luis Maria Baca were claiming a large tract of land in the vicinity of the town of Las Vegas, and the Congress of the United States, on June 21, 1860, passed an act whereby it was declared that it should be lawful for the heirs of Luis Maria Baca who made claim to the said tract of land claimed by the town of Las Vegas, *to select*, instead of the land claimed by them, an equal quantity of *vacant land*, not mineral, in the territory of New Mexico, to be located by them in square bodies, not exceeding five in number. And it should be the duty of the surveyor general of New Mexico to make survey and location of the land so selected by said heirs of Baca when thereunto required by them, etc.

170 U. S. 313-314; 42 L. 1050-1051.

Now, the terms here employed are not distinguishable so far as their meaning is concerned, from the words used in this act of June 4, 1897, and this court said in regard to this provision:

> "The grant was made in lieu of certain specific lands claimed by the Baca heirs in the vicinity of Las Vegas, and it was the purpose to permit the taking of a similar body of land anywhere within the limits of New Mexico. The grantees, the Baca

heirs, were authorized to select this body of land. *They were not at liberty to select lands already occupied by others. The lands must be vacant.* Nor were they at liberty to select lands which were then known to contain mineral."

170 U. S. 332; 42 L. 1057.

There are very many cases in which it has been held that lands in the occupancy of one person are not open to be taken under any of the various laws of the United States. Thus in Atherton v. Fowler, 96 U. S. 513, 516; 24 L. 732, Mr. Justice Miller, delivering the opinion of the court, and after saying that at the moment the land on which the hay in this case was cut became liable to pre-emption, the whole of it was, by the various persons claiming under Vallejo, settled on by them in person; inhabited and improved by them; and they had dwellings erected thereon, said:

"Unless some reason is shown not found in this record, these were the persons entitled to make pre-emption, and no one else. But suppose they were not. Does the policy of the pre-emption law authorize a stranger to thrust these men out of their houses, seize their improvements, and settle exactly where they were settled, and by these acts acquire the initiatory right of pre-emption? The generosity by which Congress gave the settler the right of pre-emption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not propose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land. To erect a dwelling house did not mean to seize some other man's dwelling. It had reference *to vacant land, to unimproved land;* and it would have shocked the

> moral sense of the men who passed these laws, if they had supposed that they extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homicides and other crimes of less moral turpitude."

This case has been followed in numerous cases, a large number of which are cited in the opinion delivered by Judge Hawley in these cases.

112 Fed. 4, 15-18; Trans. pp. 77-82.

To this list we shall add one more—that of Basey v. Gallagher, 87 U. S. 670; 22 L. 452, and take from it the following extract [22 L. 454]. Said Mr. Justice Field, delivering the opinion:

> "In the late case of Atchison v. Peterson, we had occasion to consider the respective rights of miners to running waters on the mineral lands of the public domain; and we there held that by the custom which had obtained among miners in the Pacific states and territories, the party who first subjected the water to use, or took the necessary steps for that purpose, was regarded, except as against the government, as the source of title in all controversies respecting it; that the doctrines of the common law declaratory of the rights of riparian proprietors were inapplicable, or applicable only to a limited extent, to the necessities of miners, and were inadequate to their protection; that the equality of right recognized by that law among all the proprietors upon the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream; that the government, by its silent acquiescence, had assented to and encouraged the occupation of the public lands for mining; and that he who first connected his labor with property thus situated and

> open to general exploration, did in natural justice acquire a better right to its use and enjoyment than others who had not given such labor; that the miners on the public lands throughout the Pacific states and territories, by their customs, usages and regulations, had recognized the inherent justice of this principle, and the principle itself was at an early period recognized by legislation and enforced by the courts in those states and territories, and was finally approved by the legislation of Congress in 1866."

Since the act of 1866 this encouragement to the exploration and development of the mineral resources of the United States does not depend upon silent acquiescence. It has become enacted into the laws of the United States, and all citizens of the United States, and those who have declared their intention to become such, are, by the acts of Congress, invited and licensed to go upon the public lands of the United States for the purpose of exploring them and developing the mines thereon. And these defendants were found there by this plaintiff, and they had, prior to the commencement of this suit, confessedly expended large sums of money in the development of those resources, and they had discovered and were engaged in working the mines thereon. And the decisions which we have above cited not only give no color to the doctrine that vacant lands means those only which are vacant on the records of the land office, but, on the contrary, they have established the doctrine that no law of the United States, unless, indeed, its terms be very explicit, was ever designed to authorize one person to enter lands in the occupancy of another, and obtain the title thereto, and to appropriate the labor and expenditures of the occu-

pant, and to secure to himself the improvements which may have been made thereon. Counsel have told us that the Congress of the United States had the power, for ought that appears in this bill, to have wrested this property from the defendants. Grant that to be true. The existence of a power by no means proves its exercise, and there is nothing in this act which, by any reasonable construction, gives any coloring to the proposition that Congress intended that it should have any such effect. While it might have deprived a miner of the lands upon which he had made a location at any time prior to the discovery of the mine, and the marking of the boundaries, may be true, but so far from having done any such thing in this act, it is expressly declared that the selector is limited to the selection of "vacant land." It is submitted, therefore, that the authorities which we have cited have established that no title, legal or equitable, can accrue to a mere applicant for the selection of one tract of land in lieu of another in a forest reserve. That until the selection has been approved by the land department, he has no title, legal or equitable, and it appearing from the bill that the acts on the part of Clark, the predecessor of the complainant, had gone no further than merely to make the application for the particular tract, and that the selection not only was not approved, but has been finally rejected by the department, and it also appearing from the bill that these lands were mineral lands, valuable for minerals which they contained, and for nothing else, and that the lands were in the occupancy of these defendants, plaintiff had no title, legal or equitable, to acquire, nor

to protect by injunctions or receivers. But, in the course of the arguments in this controversy, the complainant has put forward divers other propositions by which it seeks to defend its claim to a title. It has been said that the department has no authority under this act to make any regulations. It has been claimed that although Clark caused the notice to be published of his application for these tracts of land, he was not bound to do so, and the department had no authority to make any such regulation. But now it will be seen that this must also proceed upon the theory that there could be no claimants to this land that would prevent its selection unless they appeared of record, and that there was no necessity for the publication of any notice in order to ascertain what the records disclosed. But to this we answer, (1) that under the mining laws it is declared that a locator of a mine who has complied with the laws of the United States and local regulations not in conflict with those laws, shall have the exclusive right of possession of the mine. [R. S. sec. 2322]. And it is settled by this court that when such location has been made, the party acquires this right of exclusive possession, and that the interest which thus vests removes the land from the public domain, and the United States has no authority to dispose of it.

Forbes v. Consolidated Mining Co., 94 U. S. 762; 24 L. 313;

Belk v. Meagher, 104 U. S. 279; 26 L. 735;

Noyes v. Mantle, 127 U. S. 348; 32 L. 168.

In this latter case the court said, in terms, that

> "When such a location was made the claim became the property of the locators, and it is not therefore subject to the disposal of the government."

Yet such a claim does not appear upon the records of the United States Land Office, nor is there ever any entry of the lands on those records by a mining claimant, until he makes an application for a patent. But this latter he is not bound to do. Under these authorities it is held that he can maintain his possession just as one can under any other grant from the United States and that he is not bound to remain continuously in possession in order to preserve his right. Having a right, therefore, which the Congress itself could not divest, it is obvious that this act never attempted to confer the authority to make selection of such land. Take the case of a homestead claimant. He is, by the laws of Congress, authorized to settle on unsurveyed lands, and he is given the right, at any time within three months after the filing of the approved plats of a survey, in which to make his entry on the records of the land office, and the same time after his settlement upon surveyed lands. Now, when one makes an application to exchange under this forest reserve act, there may be such a homestead settler who has the preferred right for this length of time, and which time may not have expired; and another may have a mining claim thereon which he has located in conformity with the laws of the United States, and has discovered and is working the mine, in which case, as said before, they cannot be disposed of. Now, if these parties have rights acquired under the

laws of the United States, are they not entitled to be heard upon the question of whether they shall be granted to another, and how are they to be heard if no notice is given? We submit that such rights as we are here speaking of are property rights, and that no person can be deprived of his property under this government without due process of law; and that to issue a patent to one person for lands to which another has, or may have, such rights without any notice or any opportunity to be heard in defense of those rights, is in violation of the constitution, and that this has been applied as well to the action of the land department as to the courts.

Cornelius v. Kessel, 128 U. S. 456; 32 L. 482, 483-484;

Orchard v. Alexander, 157 U. S. 372, 383; 39 L. 737, 741.

From this last page we quote the following:

> "Of course this power of reviewing and setting aside the action of the local land officers is, as was decided in Cornelius v. Kessel * * * not arbitrary and unlimited. It does not prevent judicial inquiry. * * * The party who makes proofs, which are accepted by the local land officers and pays his money for the land, has acquired an interest of which he cannot be arbitrarily dispossessed. The government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the land department."

While this is spoken in a case where the money has been paid, it is just as applicable to the case of one who has acquired this right under the mining laws by a proper location including a discovery. But it is submitted that it is equally applicable to the other case, and that where one has made a homestead entry he cannot be arbitrarily deprived of it by the land department. Congress itself may, before one has acquired an equitable interest, make any disposition of the land they see fit, but no such authority is given to the land department, and one who has acquired any rights under the homestead law is as against all persons except the United States government at least, entitled to protection of that right.

Sturr v. Beck, 133 U. S. 541; 33 L. 761.

This principle is recognized in Diller v. Hawley, 81 Fed. 653-654, and in Hawley v. Diller, 178 U. S. 476, 488-490; 44 L. Ed. 1162-1163.

Notice, therefore, of such an application is necessary to acquire the jurisdiction over all who may have claims upon the land sought to be selected.

But, say our adversaries, this works a great hardship upon such selector. He has made his deed to the government, say they, and has made inquiry at the local office and found the lands to be free from any claim. He makes his selection, and if, for any reason, that selection is rejected, he is put in great difficulties and suffers a great hardship; to which we answer, (1) if the true construction of the act of congress is that one in the forest reserve who desires to remove from it, and to relinquish the land which he has in it, in con-

sideration of the privilege of selecting elsewhere, which selection may be made thereafter, he suffers no hardship at all. In that event, what he gets for his deed is the right to make a selection of vacant public lands open to settlement, and if it is determined that the particular tract selected in the first instance was not open to selection, he loses nothing; he still has what he bargained for, the right to select from such lands as are open to selection. This is manifestly the construction which Clark put upon this act, for it is shown in both instances that he made the deed long before he made the selection. But suppose that the deed is to be given at the same moment that the selection is made. Then, we say, he has not made the deed at all, for a deed has no effect until delivery; the presenting the deed to the local officers was not a delivery. They had no authority, except what they derived from the regulation, which was to accept these papers and transmit them to the commissioner for his consideration. There is no delivery of the deeds until they are accepted, and the mere passing of the instruments to the hands of the grantee does not amount to a delivery. The grantee has the right to examine it, and to reject it if it is not proper. And, moreover, he has a reasonable time in which to determine whether it is acceptable or not. These principles are declared in Harris v. Harris, 59 Cal. 620, 622.

Tiedman on Real Property, sec. 812;

3 Washburn on Real Property, p. 354, sec. 28;

Los Angeles Immigration and Land Co-operative Ass'n. v. Phillips, 56 Cal. 539, 551-554.

Ryan v. United States, 136 U. S. 68, 85-86; 34 L. 447.

And in a case like the present, if, as we contend, it is the business of the land department to investigate and ascertain and determine whether the lands are subject to selection or not, then a reasonable time for the acceptance of the deed is such time as is reasonably necessary to make such investigation. And when the land department rejects the selection, it rejects the deed as well.

Now if, when this application is made, the land department should see fit to send out an agent to investigate these lands in person to ascertain whether they were vacant at the time the application was made, or whether they were then mineral lands, we do not suppose that it could be well doubted that that agent might, if he saw surface indications of mineral therein, make explorations for the purpose of ascertaining whether they were in fact mineral, and if the result of those investigations was to prove that they were, the lands would not be open to selection. Is there any difference between such an investigation and the taking of evidence before the department, either by affidavit or otherwise, to determine the same facts? When it is said that a discovery made subsequent to this application cannot affect it, it is submitted that this is a mistake. That the mineral character is altogether different from the character of vacant, if, at the time the application is made, they are vacant, any subsequent

settlement is a change of the conditions, and would not be allowed to defeat the application, either under the forest reserve law or any other. As, for instance, if a pre-emptor or homestead claimant settles upon lands which are then vacant, no one could defeat that right by a subsequent occupancy of the lands. But the discovery of mineral don't make the lands mineral: they were mineral before, or the discovery could not have been made. The discovery does not change the condition itself; it is simply producing the proof of an already existing condition.

Besides the cases which we have already cited upon this subject, it is submitted that the decision in the case of Barden v. Northern Pacific R. R. Co., 154 U. S. 288; 38 L. 992, is conclusive upon this subject. In that case the wide difference between mineral lands and known mineral lands is pointed out. There the exception from the Northern Pacific railway grant was of the mineral lands, not lands which were known to be mineral. And in that case, as in this, in order to maintain the construction here contended for, it was necessary to insert in the exception the term "known" mineral lands. The statutes do not now say so, and if they did, the interpretation always was, known at the date of the sale.

It was contended in the Barden case that the title vested upon the definite location of the road, and that therefore no discovery of mineral after that could affect that title. But until there had been an investigation and determination by the department, the claimant was, of course, compelled to rely upon the act itself as con-

stituting that grant. But, as was shown by Mr. Justice Field, so long as he had to rely solely upon the terms of the act, it was confronted with the fact that the grant excepted from its operation the mineral lands, and that if these lands were mineral in fact, they did not pass by force of the act itself, for in that case they fell within the exception, and not within the grant, and that it was not until there had been an official investigation by the tribunal authorized to determine it, and a determination that the lands fell within the grant, that the question of mineral or non-mineral was foreclosed.

And so we might say here, so long as the parties are compelled to rely upon the act itself, and not upon the action of the department determining that the lands are subject to selection, the same principle applies; if the lands are mineral, they are not subject to selection. And until there has been an official determination that they come within the class of lands subject to selection, the question of mineral or non-mineral is not precluded. There has been no sale, no equitable title has vested, no judgment upon the character of the lands themselves by the only tribunal authorized to give such judgment.

But this is the point at which it is said a great hardship is wrought. We answer that if it is, it is not comparable to the hardship suffered by homestead and preemption claimants. They both, under the very laws by which they are seeking to acquire the title, are required to settle upon them, improve and cultivate them. They both come to the land office and ascertain [illegible]

that there is no other claim of record, and in the case of the homestead claimant, he is required, unless he chooses to avail himself of the privilege of commuting, to reside upon, cultivate and improve the lands for five years. And after he has made his entry in the first instance, and settled upon the lands and cultivated them, and perhaps expended thousands of dollars in their improvement, and has given his labor for the full five years, and makes his application to be permitted to make the final proof, and gives notice of the hearing and final entry, finds that twenty-four hours before that proof is offered, somebody has discovered a mine upon the lands, and appears at the land office to contest the entry, and alleges and proves that the land is mineral land, although never known until twenty-four hours before to be such, and his claim is defeated, why? Because the lands are not subject to entry under the homestead law. It was once conceded that the mineral lands are not subject to entry or selection under this forest reserve act, and we say that subsequent discovery of mines upon the land thereby defeating the claim, works no hardship upon the forest lieu selector to be compared with that which the homestead claimant suffers for the like reasons. Even, therefore, if it were true that no mine had been discovered on this land prior to the original application, yet no title, legal or equitable, had vested at the time this bill was filed, and we know from that bill that the lands were known, at least at that time, to be mineral lands.

Again, our adversaries say, conceding that the department had the power to make any such regulations

as are claimed were made in this case, yet they or Clark had done all which either the law or the regulations required of him, and were therefore entitled to the patent, and hence had an equitable interest. But without repeating what we have already said, namely, that the selection is not made until it is approved, and again insisting that these lands being occupied, were not subject to selection, we maintain that the complainant's predecessors had not done all that was required, nor does the bill show that they had. This court takes judicial notice of the regulations of the department.

Caha v. United States, 152 U. S. 211; 38 L. 415.

Now the honorable secretary of the interior, in Kern Oil Company v. Clarke, 30 L. D. 550, after having shown that selections under this act could not be lawfully selected until it was shown that the selected land was vacant and not known to be valuable for mineral, because no other lands were subject to selection, and no selection could be regarded as complete until these conditions were made to appear; and after further saying that in this case the land was surveyed in 1854, but whether they had continued ever since that date to be vacant or occupied, or whether at any time they were known to be valuable for minerals, were matters not shown by the land office records, and that a right to a patent is not acquired in any case until the proofs are such that patents could be issued upon them if nothing was shown to the contrary, and that as long as anything remained undone which was essential should be done by the selector in order to entitle him to a patent, the right thereto did not vest, and after further

saying that a non-occupancy affidavit was just as essential as a non-mineral affidavit (*id.* 567), said:

> "The statement of appellant that the land department has never required selections under the act in question to be accompanied by a showing that the selected land is vacant or unoccupied, is not correct. As early as April, 1898, a printed form of application was prescribed by your office" (this is addressed to the commissioner of the general land office), "and sent to the various local land offices for use in making selections under this act. This form is as follows, the non-occupancy clause being italicized:

Then follows the form.

And the italicized clause is:

> "That he submits therewith an affidavit showing the lands selected to be non-mineral in character and unoccupied."

And then the honorable secretary continues:

> "The evidence required to accompany the application or selection is here clearly set forth. The selector is required to submit with his application 'an affidavit showing the lands selected to be non-mineral in character and unoccupied.'
>
> "This form of application (4-643) was specifically approved by the secretary of the interior in the regulations of May 9, 1899 [28 L. D. 521, 524], and December 18, 1899 [29 L. D. 391, 394]. In this respect these regulations have remained unchanged, and they are alike obligatory upon your office, local land offices and all owners and claimants of land within the limits of a forest reserve who seek to exchange the same for other lands under said act."

Id. pp. 568-569.

And the honorable secretary proceeds to show that from the affidavit made by Clarke in this matter, he

had stricken out the words "that there is no occupation of said land adverse to the selection thereof under the act of June 4, 1897," and "that no portion of said land is claimed for mining purposes under the local customs and rules of miners or otherwise," and that the result of the striking of this from the affidavit was that the selections were not accompanied by any showing whatever respecting the state of vacancy, or occupancy, of the lands at the time of selection, and he held that for this reason the affidavits were insufficient, and the selections imperfect.

Id. 569.

We think we called attention to the fact that the answer does not allege that any proof had been offered to the department that these lands were vacant. Complainant alleges in the bill that the lands were vacant, but not that any proof of it had been offered to the department, and, as we have said, it is obvious that the meaning was that the lands were not claimed of record, which they insist upon to this day is the meaning of the statute.

Now, another regulation of the department in regard to this forest reserve lieu act will be found in 24 L. D., pp. 592-593, and the 18th regulation is that all applications for change of entry or settlement must be forwarded by the local officers to the commissioner of the general land office for consideration, together with a report as to the status of the tract applied for.

24 L. D., 593.

This, we say again, was the sole authority for the local officers to take any action in regard to the matter at all, and the limit of their authority was to receive these papers, forward them to the commissioner of the general land office to be considered there, together with a report as to the status of the tract applied for, and this part of the regulation was observed by those officers.

Then, almost ever since the statute for the disposition of the mineral lands was enacted, there has been constantly a regulation of the department requiring all persons who desire to acquire any lands other than mineral lands to make a non-mineral affidavit, and in making this regulation they have had the sanction of the courts in those decisions to which we have before referred wherein they have held that the mineral lands are not subject to disposition under any other laws than those which congress passed expressly for that purpose, and as they are not subject to be taken under any other laws, the land department not only demands proof that they are of a character to be taken, but it is its duty to do so. And in the circular from the general land office showing the manner of proceeding to obtain title to public lands under the homestead, desert land, and other laws, issued July 11, 1899, in the published general rules applicable to the different classes of entries, which begins on page 83 of that issue, on page 87 will be found rule 24, and it is as follows:

> "In all entries of non-mineral lands in the states of California, Colorado * * * a non-mineral affidavit is required."

The stars here stand for other states and territories named.

Now, such, together with the regulation requiri the notice, were the regulations existing at the time the application was made, and it is obvious that the complainant had not complied with them in the particular above mentioned.

Another proposition put forward by the complainant since the commencement of this controversy is that the department had no power under this statute to make regulations.

We have already called attention to the fact that it is not necessary that an act of congress should specially clothe the land department with the power to administer the laws for the disposition of the public lands, and also that the laws for that disposition constitute one entire system, are *in pari materia*, and are to be construed together, and that the general authority conferred upon the land department applies in the exercise of its duties of administering the laws for the disposition of the public lands. The power to make regulations binding upon courts, if they are reasonable and consistent with law, has been affirmed by the courts in many different cases.

Chapman v. Quinn, 56 Cal. 266;

Poppe v. Athearn, 42 Cal. 607;

Germania Iron Co. v. James, 89 Fed. 811, 813-818, and authorities cited. Also

Hoover v. Salling, 102 Fed. 716;

Bishop of Nesqually v. Gibbons, 158 U. S. 155; 39 L. 931.

And these regulations have been upheld as reasonable in the very cases now under consideration, and by the Circuit Court of Appeals.

112 Fed. 4, 11-12, and cases cited.

And the complainant's contention that no such power existed cannot be maintained, and these regulations were valid and reasonable, and those making applications for the exchange of lands under this act are bound to comply with them.

V.

The complainant is not entitled to any relief upon the facts set forth in the bill.

We have endeavored to show that the complainant is not entitled to the principal relief sought, namely, a decree quieting the title to this property, from the simple fact that it has no title, either legal or equitable, to quiet. And in dealing with that subject we have been assuming that the pleading on the part of the plaintiff is good in form, and that any inferences fairly deducible from it might be indulged for the purpose of upholding it. We now submit that the bill is not sufficient, that its allegations do not entitle the complainant to any relief for the reason that the allegations are not such as are requisite in a pleading of a right such as is here claimed. It is obvious that the plaintiff is here claiming a right under a statute, a right which has no existence independently of that statute, and it is an established rule that in pleading a right given by a statute and dependent upon the existence of particular

facts, the pleader must state the facts upon which that right or privilege depends.

Dye v. Dye, 11 Cal. 163, 167-168;
Hillman v. Davis, 35 Cal. 441, 448;
Rhoda v. Alameda Co., 52 Cal. 350;
San Luis Obispo v. Hendricks, 71 Cal. 242, 246;
Perine v. Forbush, 97 Cal. 309-310;
Little York Gold Washing & Water Co. *et al.* v. Keyes, 96 U. S. 199; 24 L. 656.

This latter was a suit in a state court by the owner of certain agricultural land situated on Bear river, to restrain the defendants from depositing the tailings and debris from their several mines in the channels of the river. At the time this suit was brought the judiciary act of 1875 was in force, under which it was held that though the federal jurisdiction did not appear upon the face of the complaint, the defendants might, in a petition for the removal of the cause, show that a federal question was involved, for the purpose of having it removed to a federal court; and in this case the petition was filed, the claim being that the petitioners were owners of certain extensive and valuable gold bearing placer mines situated in the counties of Nevada and Placer, state of California, which they claimed under the laws of the United States, and were engaged in working the same by hydraulic process, the only way in which they could be worked, and that to work them in that manner the results which were complained of were the necessary consequences. And it further alleged in the petition that the said action "arises under, and its determination will necessarily involve and re-

quire the construction of the laws of the United States above mentioned, as well as the pre-emption laws of the United States." The suit was transferred, but the manner in which this right was set forth was as above stated. The petitioner did not state the facts constituting its right to the mining claims, but stated generally that it owned the claims, and claimed them under the laws of the United States, and afterwards there was a reference to those acts under which they claimed, and then there was the general averment that the action arises under, and its determination necessarily involved and required the construction of the laws of the United States above mentioned, as well as the pre-emption laws of the United States. Chief Justice Waite, delivering the opinion of the court, said:

> "For the purposes of the transfer of a cause, the petition for removal, which the statute requires, performs the office of a pleading. Upon its statements in connection with the other parts of the record, the courts must act in declaring the law upon the question it presents. It should, therefore, set forth the essential facts not otherwise appearing in the case, which the law has made conditions precedent to the change of jurisdiction. If it fails in this, it is defective in substance, and must be treated accordingly. * * * * *
>
> "The office of pleading is to state facts, not conclusions of law. It is the duty of the court to declare the conclusions, and of the parties to state the premises.
>
> "In this petition, the defendants set forth their ownership, by title derived under the laws of the United States, of certain valuable mines that can only be worked by the hydraulic process, which necessarily requires the use of the channels of the river and its tributaries in the manner complained of; and they allege that they claim the right to

this use under the provisions of certain specified acts of congress. They also allege that the action arises under, and that its determination will necessarily involve and require the construction of, the laws of the United States specifically enumerated, as well as the pre-emption laws. They state no facts to show the right they claim, or to enable the court to see whether it necessarily depends upon the construction of the statutes.

"Certainly an answer or plea, containing only the statements of the petition would not be sufficient for the presentation of a defense to the action under the provisions of the statutes relied upon. The immunities of the statutes are, in effect, conclusions of law from the existence of particular facts. Protection is not afforded to all under all circumstances. In pleading the statute, therefore, the facts must be stated which call it into operation. The averment that it is in operation will not be enough; for that is the precise question the court is called upon to determine."

24 L. 658.

The allegations of the bill in this case have, we suppose, been sufficiently referred to. The complainant alleges that it is the owner of an undivided three-fourths interest in lots one and two, etc., in paragraph III of the bill, page 4 of the transcript, but that is not sufficient when it appears that it is claiming that title under a statute; that is not the statement of the facts, but the pleader's conclusion from them.

In the fifth paragraph it is alleged that on the 16th of November, 1899, Clarke was the owner of title in fee simple, absolute, free of any lien or incumbrances, of a tract of 165.35 acres of land; which land was then, and still is a non-mineral tract, covered by a *bona fide* patent issued by the United States, and said tract was

then and still is included within the limits of a public forest reservation of the United States.

The land claimed to be owned is not even described. The time when the patent issued is not stated, nor to whom. The forest reservation is neither described nor named.

And in the sixth paragraph, the vacancy of the lands which were sought to be selected is not alleged in any other way than that the tract was surveyed, unappropriated and vacant public land, but if the meaning of this statute was such as is claimed by the defendants, this was not a sufficient allegation, and the very fact that the term "vacant" may be used in one or another sense, shows the necessity of making the statement of the fact upon which the right depended.

Trans. p. 5, pars. 5-6.

In paragraph seven we are told that Clarke delivered at the land office, among other things, a non-mineral affidavit, *showing the selected tract contained no known minerals.*

Trans. pp. 5-6, par. 7.

There is never anywhere any statement as to what that affidavit contained, but merely the pleader's conclusion that it showed a certain state of facts, and as before stated, it is alleged in general terms, that the land was vacant, but it is not claimed that any affidavit upon the subject or any evidence of any kind was presented to the local officers.

And as these allegations are all in the same form with respect to these locations, it is submitted that they

are not sufficient under the rule of pleading to which we have referred, because not the statement of facts bringing the case within the statute, but the conclusions of the pleader that they are within it. And for this reason, also, we maintain that the bill is insufficient to entitle the complainant to the principal relief sought in this action.

There is, then, nothing left of the relief sought except the demand for an injunction, and the appointment of a receiver. But both of these things depend upon the sufficiency of the allegations of the bill to entitle the complainant to the principal relief. Injunction will not lie to restrain the mining operations upon these lands unless it appears that they were the property of the complainant. A suit cannot be maintained merely for the appointment of a receiver, for there is no such thing as any such suit. The appointment of a receiver is always ancillary to some other relief sought.

French Bank Case, 53 Cal. 552, 553;
Havemeyer v. Superior Court, 84 Cal. 365;
People's Investment Co. v. Crawford, 45 S. W. 738.

The injunction sought is evidently one which is to attend the appointment of a receiver pending the action, and to follow a judgment determining the plaintiff's ownership. But if the bill is insufficient for either of those purposes, the complainant was not entitled to an injunction. And it follows that none of the relief here sought can be obtained.

VI.

The Bill is Multifarious.

We know that this is an objection that is left largely to the discretion of the court, and one which the courts are not eager to sustain. Still, it is submitted that this bill is so manifestly improper that that objection alone is sufficient to defeat this suit, and upon which the decision of the court below should be affirmed.

It is true that we cannot tell from the fifth paragraph of the complaint, page 5, and paragraph nine, page 6, but what the tracts owned by Clarke on the 16th day of November, 1899, referred to in those paragraphs, were one and the same tract. No information is given us upon that subject, nor anything from which we could infer that they were different tracts except a slight difference in the amount of land contained in them, one being 165.17 acres, the other 165.35 acres. But if it should be construed to mean that the two tracts were identical, then of course, the bill is wholly insufficient. Undoubtedly the claim is that they are separate tracts. Now, on the 8th of December, 1899, in lieu of the lands referred to in paragraph 5, Clarke selected the lands referred to in paragraph 6. Those lands in paragraph 6 were lots one and two of the southwest quarter of section 30, township 28 south, range 28 east, M. D. B. & M. Then, in lieu of the tract described in paragraph nine, he selected lots one and two of the *northwest quarter of section* 30. Thus, there are two different tracts of land selected under two different bases. The claims of the defendant are al-

leged to be under four certain pretended placer mining locations, one purporting to cover the S. W. quarter of sec. 30, in T. 28, etc., known as the "Luck" oil placer mining claim, made on the 2nd of June, 1899, by certain persons who were named. The second purporting to cover the N. W. quarter of sec. 30, alleged to have been made the 2nd day of June, under mining laws, by the same parties. The others covering the balance of those two quarter sections under location made by different parties. And the parties defendant are not all interested in either one of these tracts so selected. In other words, a bill is filed here based upon selections of two different tracts of land, upon two different bases, against parties, some of whom claim in one tract and some in the other, some under one right or mining location, and some under another. And it is submitted that this bill is multifarious under any definition of that term.

I Beach Modern Equity, sec. 115 *et seq.*

And it is respectfully submitted that the judgment should be affirmed.

F. H. SHORT and
J. S. CHAPMAN,
Solicitors for Defendants.